

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

77-7075

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Richard W. Baldwin

-----X
ESSO NEDERLAND b.v.,

Plaintiff-Appellee

-against-

M.T. TRADE FORTITUDE, her
engines, boilers, etc.
and MARASTRO COMPANIA NAVIERA, S.A.,

Defendants-Appellants
-----X

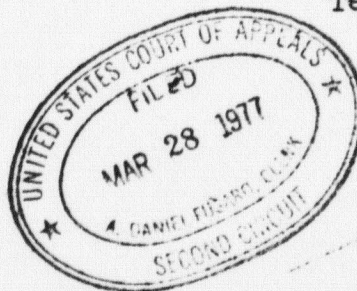
:
:
: Docket Number
: 77-7075
:
:

JOINT APPENDIX

(On Appeal from the United States District
Court for the Southern District of New York)

CARDILLO & CORBETT
Attorneys for Defendants-Appellants
Office & P.O. Address
29 Broadway
New York, New York 10006
Tel. No. (212) 344-0464

Richard W. Baldwin
Eugene J. O'Connor
Of Counsel



PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
ESSO NEDERLAND b.v.,

Docket Number
77-7075

Plaintiff-Appellee :

-against-

M. T. TRADE FORTITUDE, her engines,
boilers, etc. :

and MARASTRO COMPANIA NAVIERA, S. A., :

Defendants-Appellants.
-----X

JOINT APPENDIX

TABLE OF CONTENTS

	Page
Docket Sheets.....	1
Findings of Fact and Conclusions of Law.....	3
Judgment.....	11
Requests to Admit.....	12
Answers to Requests to Admit.....	13
Rescript of Questions and Answers on Oral Questions, dated March 25, 1976.....	14
 Transcript:	
Pages 39-39 (Scott-Direct).....	21
41 (Scott-Direct).....	23
50-54 (Scott-Cross).....	24
60-62 (Scott-Cross).....	29
65-66 (Scott-Cross).....	32
70-77 (Mullen-Direct).....	34
91-93 (Mullen-Direct).....	48
95-106 (Mullen-Direct).....	51
109 (Mullen-Direct).....	63
111-149 (Mullen-Direct & Cross).....	64
150-152.....	103
156-171 (Nicols-Direct).....	106

	Page
Pages 187-189 (Nichols-Direct)	122
195 (Nichols-Cross)	125
204-205	126

DATE	NR.	DOCKET SHEETS	PROCEEDINGS
02-05-75		Filed Complaint, Listed Summons.	
02-19-75		Filed summons and return- served: Marastro Compania Naviera by Alexis Nichlos on 02-10-75	
03-01-75		Filed stip & order extending defts time to answer, etc. the complaint to 03-28-75. So ordered- FRANKEL, J.	
04-15-75		Filed ANSWER of deft. Marastro Compania Naviera S.A. to the complaint (020)	
04-01-75		Filed pltf's notice of taking deposition of deft. Marastro Compania Naviera, S.A. by the Master & Chief Officer of the Trade Fortitude, etc. on 04-17-75	
1-26-76		Filed pltf's requests for admission.	
3-29-76		Filed pltf's notice to take deposition of J. Van Krimpen.	
3-31-76		Filed pltf's request to admit.	
3-31-76		Filed Stip & Order that time for deft to serve any cross questions is reduced to 20 days from date of service of said written questions. FRANKEL, J.	
4-15-76		Filed defts statement in response to request for admissions.	
4-15-76		Filed defts request to admit.	
4-15-76		Filed defts statement in response to request for admission.	
4-20-76		Filed defts notice to take deposition of Mr. J. van Krimpen.	
4-26-76		Filed pltf's statement in response to request to admit.	
5-28-76		Filed defts affdvt & notice of motion for an order delining jurisdic- tion of the entitled action re clause which provides that the High Court of London shall have exclusive jurisdiction of any disputes re bill of lading. Ret. 6-15-76.	
5-28-76		Filed defts memo of law in support of motion to dismiss the complt.	
6-14-76		Filed pltf's affdvt in opposition to defts motion to dismiss the action	
6-14-76		Filed pltf's memo of law in opposition to defts motion to dismiss.	
6-15-76		Filed defts reply memo in reply to pltf's memo & affdvt re opposition to defts motion to dismiss.	
7-21-76		Filed Letters Rogatory re deposition of Jakob Van Krimpen, taken by the Consul of the U.S.A. in the Kingdom of the Netherlands, Province of South Holland, City of Rotterdam. n/m	
7-21-76		Filed Letters Rogatory re deposition upon written cross questions taken by the Consul of the U.S.A. in the Kingdom of the Netherlands, Province of South Holland, City of Rotterdam. n/m	

DATE	PROCEEDINGS
7-29-76	Filed Memo-Ent. on motion dtd 5-23-76. It would be unreasonable & unjust to enforce the forum clause on this grossly tardy motion. The motion is denied. So Ordered, FRANKEL, J. n/m
9-14-76	Filed defts answers to plffs.
10-13-76	Filed plffs answers & objections to defts interros.
10-20-76	Non-Jury trial begun & con't.
10-21-76	Trial con't & concluded. Total trial days (2). Decision Reserved
11-16-76	Filed defts post-trial proposed findings of fact & conclusions of law. OCT 20 21 1976
12-13-76	Filed defts post-trial memo of law.
1-13-77	Filed plffs post-trial proposed findings of fact & conclusions of law.
1-13-77	Filed plffs reply memorandum.
1-13-77	Filed plffs post trial memorandum.
1-13-77	Filed Findings of Fact & Conclusions of Law re action for damages arising from the short delivery of a cargo of crude oil. For the reasons indicated, The Clerk of the Court will enter judgment in accordance with the foregoing findings & conclusions. So Ordered, FRANKEL, J. n/m
1-28-77	Filed Final Judgment & Order #77,223, that plffs recover of defts the sum of a total of \$43,142.84 with costs to be taxed & with interest on said total recovery according to law until paid.....FRANKEL, J. Judgment Ent. 1-28-77, Clerk. n/m
2-10-77	Filed defts notice of appeal to the USCA from the final judgment ent. 1-28-77. Copy sent to: Kirlin Campbell & Keating, 120 B'way, New York, N.Y. 10005.
2-10-77	Filed Supersedeas Bond for Undertaking on Appeal - in the sum of \$48,138.55 - Insurance Co. of North America.
2-23-77	Filed plffs notice of cross-appeal to the USCA from the final judgment ent. 1-28-77, tha the amount of damages allowed (\$36,725.44 is inadequate, etc. Copy sent to: Cardillo & Corbett 29 Broadway New York, N.Y. 10006 (Attys for deft Marastro Compania Naviera
3-3-77	Filed Original Records from the USCA dtd 3-3-77.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x		
ESSO NEDERLAND b.v.,	:	
Plaintiff,	:	
-against-	:	
M.T. TRADE FORTITUDE, her	:	75 Civ. 572
engines, boilers, etc.,	:	
and MARASTRO COMPANIA NAVIERA, S.A.,	:	FINDINGS OF FACT
	:	AND
Defendants.	:	CONCLUSIONS OF LAW
- - - - - x		

FRANKEL, D.J.

This is an action for damages arising from the alleged short delivery of a cargo of Nigerian crude oil carried by the M.T. Trade Fortitude from Bonny, Nigeria, to Rotterdam, The Netherlands, in early 1974. The case has been tried to the court without a jury. The court's findings of fact and conclusions of law are as follows:

Findings of Fact

In June, 1970, plaintiff contracted for supply of its crude oil requirements with Exxon International, an affiliated corporation.¹ In January, 1974, Exxon International purchased a quantity of Nigerian light and medium crude oil for resale to plaintiff and had the oil delivered to the

1. Plaintiff, Esso Nederland, is an affiliate of the Exxon Corporation, of which Exxon International is a division.

defendant vessel, the M.T. Trade Fortitude, in Bonny, Nigeria. The vessel was operating under a time charter to Standard Tankers (Bahamas) Company, a subsidiary of Exxon Corporation, and had been ordered by the charterer to Bonny to load the oil for carriage to Rotterdam. The bill of lading indicated that the following quantities of crude oil had been delivered to the vessel:²

	<u>Light</u>	<u>Medium</u>	<u>Total</u>
Gross	33,278 L/T	27,726 L/T	61,004 L/T
Net	33,179 L/T	27,690 L/T	60,869 L/T

Plaintiff paid Exxon International on the basis of the net quantities specified in the bill of lading at a rate of \$10.321/bbl for the medium crude and \$10.658/bbl for the light crude.

After completion of loading at Bonny, ullages were taken of the vessel's tanks. The certificate of tank ullage indicated that, after excluding 200 L/T of slops³ contained in

2. Gross figures record both the amount of oil and the amount of bottom sediment and water. Net figures record only the amount of oil after the bottom sediment and water have been deducted.
3. Slops are the residue from previous cargo or tank washings which remain on board the vessel. The general composition of such slops is 90-95% water and 5-10% oil. In calculating the amount of cargo pumped into or out of the vessel, it is necessary to subtract the amount of slops present in the vessel prior to the loading of new cargo.

tank #5, some 33,797 (gross) L/T of light and 27,687 (gross) L/T of medium crude oil, or a total of 61,484 (gross) L/T, were contained in the Trade Fortitude's tanks, some 480 L/T more than had been delivered to the vessel according to the bill of lading.

The vessel sailed from Bonny on January 22, and arrived in Rotterdam a little over two weeks later, on February 7. Upon arrival, two separate sets of ullages were taken. The first, conducted by Chevron Petroleum Maatschappij (Nederland) N.V., showed 60,968 (gross) L/T of crude oil on board the vessel, 516 (gross) L/T less than reported in the ullage taken at Bonny. The second, taken by the Rotterdam Chemical Laboratory of a Dr. Verwey, reflected only a 323 (gross) L/T shortage when compared with the Bonny ullages. However, Dr. Verwey's ullage report, unlike that prepared by Chevron, included the 200 (gross) L/T of slops in its final figures, thus substantially accounting for the difference between the two.

Unloading of the vessel, under the supervision of a surveyor from Dr. Verwey's Laboratory, commenced on February 8. Upon completion of unloading on the following day, a dry tank certificate was issued to the Trade Fortitude stating that the tanks had been drained to the satisfaction of the supervisor. The oil, now in plaintiff's possession after passing through the vessel's flange, was pumped into the nearby Chevron shore storage tanks. Dr. Verwey's Laboratory then took various measurements

of the shore tanks and calculated the amount of oil in them. These calculations yielded the following figures, including the 200 (gross) L/T of the slops:

	<u>Light</u>	<u>Medium</u>	<u>Total</u>
Gross	33,471 L/T	27,404 L/T	60,875 L/T
Net	33,312 L/T	26,947 L/T	60,259 L/T

Conclusions of Law

1. Plaintiff has proved through a comparison of ullages taken at Bonny and Rotterdam a short delivery of 516 L/T of Nigerian crude oil. The defendants have not satisfactorily explained the shortage; it follows that defendants are liable for the loss unless one or more of their several defenses, hereinafter considered, should be sustained. See Lekas & Drivas Inc. v Goulandris, 306 F.2d 426 (2d Cir. 1962); Gilmore & Black, The Law of Admiralty 182-85 (2d Ed. 1975).

2. Both plaintiff and defendants have suggested alternate methods of calculating the magnitude of the cargo shortage, but the court is persuaded that those other methods are deficient in significant respects. Specifically, plaintiff has urged that the loss of cargo be calculated by comparing the net figures on the bill of lading with the net figures contained in Dr. Verwey's survey of the Chevron storage tanks in Rotterdam. Acceptance of these figures would yield a shortage of 810 L/T after allowance is made for the 200 L/T of slops. The difficulty with this method is that it depends

on a measurement of the cargo taken after it had passed out of the custody of the carrier. As plaintiff's own witness testified under questioning by the court, Esso Nederland generally takes charge of the oil when it crosses the flange at the discharge point, which in this case would have been before the oil was pumped into the storage tanks surveyed by Dr. Verwey. If, as the court now holds, defendants' responsibility for the cargo ceased at the time of delivery, reliance on measurements taken after that time to establish a shortage is unjustified. Cf. Centerchem Products v. A/S Rederiet Odfjell, 1972 AMC 373 (E.D. Va. 1971).

Defendants' suggestion that the existence or magnitude of the alleged shortage be determined by comparing the bill of lading figures with the ullages taken at Rotterdam is also unsatisfactory, though for a different reason. The record contains persuasive evidence that the Trade Fortitude's tanks were not accurately calibrated and that all ship-to-shore comparisons were tainted by the inaccuracy. Specifically, the ullages taken after loading at Bonny showed that 61,484 (gross) L/T of cargo were contained in the vessel's tanks, some 480 L/T more than the bill of lading shows were ever delivered to the vessel by the supplier. A similar disparity, though of a reduced magnitude, was found to exist between the results of the ullages taken at Rotterdam and the survey, based on measurements of Chevron's shore storage tanks, of the amount of cargo actually unloaded from the ship.

In light of the problems, both legal and practical, raised by reliance on either shore-to-shore or ship-to-shore comparisons, the court concludes that the only satisfactory predicate for determining whether there is liability, and, if so, its extent, is a comparison between the ullages taken at Bonny and those at Rotterdam.

3. Having established a shortage of 516 (gross) L/T of oil, the plaintiff is entitled to damages in the amount of \$36,725.44⁴ plus 6% simple interest per annum from February 13, 1974, one day after the completion of Dr. Verwey's Report identifying the shortage, to the date of this judgment. In arriving at this figure, the court has considered the prices charged Exxon International by B.P. Trading Ltd.⁵ for the cargo in an arm's length transaction to be a more reliable measurement of its actual value than the prices Exxon International charged its corporate affiliate, Esso Nederland.⁶ Compensation for freight on the lost cargo is

4. The damages were calculated in the following manner. The cargo shortage consisted of 107 L/T of light crude oil, or 814.2 barrels, based on a conversion factor of 7.6091925 barrels/per L/T, and 409 L/T of medium crude, or 2910.9 barrels, based on a conversion factor of 7.1172338 barrels per L/T. The number of barrels were then multiplied by the appropriate price, \$9.14/barrel of light crude and \$10.06/barrel of medium crude, to yield the final figure of \$36,725.44.

5. Exxon International purchased the oil from B.P. Trading Ltd. at the following prices:

light crude - \$9.14/U.S. barrel
medium crude - \$10.06/U.S. barrel

6. Esso Nederland paid Exxon International \$10.658/U.S. barrel of light crude and \$10.321/U.S. barrel of medium crude oil.

not included because the evidence does not establish that any payment for freight was ever made to the defendants.

4. The court rejects defendants' contention that the law should honor and incorporate an asserted "custom" in the trade for a carrier to be given a 0.5% allowance for loss of cargo in transit. Neither the bill of lading nor the charter party makes reference to any such allowance, and defendants have cited no authority supporting its applicability in litigated cargo shortage cases. The fact that an allowance may be used in settlements of cargo disputes does not entail that it should be treated as a rule of law.

5. The August 3, 1974, settlement of claims arising out of the charter party, executed between the owners of the Trade Fortitude and Standard Tankers (Bahamas) Corporation, does not release defendants from liability for the cargo shortage established in this action. The claim of release is a tardy and unsubstantial afterthought. The release itself makes reference only to disputes arising out of the charter party, not to claims for an unrelated cargo shortage. The communications from the defendant owner to the plaintiff and its agent, both contemporaneous with and after the execution of the release, belie any suggestion that the parties to the release considered it applicable to this dispute. Finally, the court notes that plaintiff was not a party to the arbitration proceedings which led to the August 3 agreement; defendants have offered no evidence

which would warrant piercing the corporate veil and holding Esso Nederland bound by a release executed by its corporate affiliate, Standard Tankers (Bahamas) Corporation. See, e.g., Interocean Ship Co. v. National Ship and Trade Corporation, 523 F.2d 527 (2d Cir. 1975); Fisser v. International Bank, 282 F.2d 231, 237-38 (2d Cir. 1960).

The Clerk of the Court will enter judgment in accordance with the foregoing findings and conclusions.

So ordered.

Dated, New York, New York

MARVIN E. FRANKEL

January 12, 1977

U.S.D.J.

JUDGMENT

The above entitled action having been tried before Honorable Marvin E. Frankel without a jury and all the parties having appeared at the said trial by their respective counsel and the Court having made its findings of facts and conclusions of law dated January 12, 1977 providing that plaintiff is entitled to damages in the amount of \$36,725.44 plus 6% simple interest per annum from February 13, 1974, it is

ORDERED AND ADJUDGED that ESSO NEDERLAND b.v., plaintiff, recover from the M.T. TRADE FORTITUDE and MARASTRO COMPANIA NAVIERA, S.A., defendants, the sum of \$36,725.44 together with interest at 6% per annum thereon from February 13, 1974 to and including January 12, 1977, the date of the findings of facts and conclusions of law, amounting to the sum of \$6,417.40 making a total recovery of \$43,142.84 with costs to be taxed and with interest on said total recovery according to law until paid.

*Dated: New York, NY
January 26, 1977*

JUDGMENT Entered: January 28, 1977

Raymond F. Burghardt
Clerk

APPROVED January 26, 1977

Marvin E. Frankel
U. S. D. J.

REQUESTS TO ADMIT

SECOND: That the gross quantity of light Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 253,490 United States barrels at 60°F.

THIRD: That the gross quantity of light Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 33,278 long tons.

FOURTH: That the nett quantity of light Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 252,856 United States barrels at 60°F.

FIFTH: That the nett quantity of light Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 33,179 long tons.

SIXTH: That the gross quantity of medium Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 197,337 United States barrels at 60°F.

SEVENTH: That the gross quantity of medium Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 27,726 long tons.

EIGHTH: That the nett quantity of medium Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 197,112 United States barrels at 60°F.

NINTH: That the nett quantity of medium Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 27,690 long tons.

ANSWERS TO REQUESTS TO ADMIT

SECOND and THIRD: Defendants admit that the gross quantity of light Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 253,490 United States barrels of 60°F or the equivalent of 33,278 long tons.

FOURTH and FIFTH: Defendants admit that the net quantity of light Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 252,856 United States barrels at 60°F or the equivalent of 33,179 long tons.

SIXTH and SEVENTH: Defendants admit that the gross quantity of medium Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 197,337 United States barrels at 60°F or the equivalent of 27,726 long tons.

EIGHTH and NINTH: Defendants admit that the net quantity of medium Nigerian crude oil delivered to the M/V TRADE FORTITUDE on January 21, 1974 for carriage to Rotterdam amounted to 197,112 United States barrels at 60°F or the equivalent of 27,690 long tons.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ESSO NEDERLAND b.v., :

Plaintiff, :

-against- :

M.T. TRADE FORTITUDE, her engines, :
boilers, etc., and MARASTRO COMPANIA :
NAVIERA, S.A., :

Defendants. :

R E S C R I P T

DEPOSITION UPON
WRITTEN QUESTIONS

75 Civ. 572 (MEF)

-----X
PLAINTIFF'S WRITTEN QUESTIONS
TO BE ANSWERED BY MR. J. van
KRIMPEN

(1) State your name.

Jakob Van Krimpen

(2) State your address.

c/o Chemical Laboratory "Dr. A. Verwey", Coolhaven 32, Rotterdam -3006
The Netherlands

(3) By whom are you presently employed?

Chemical Laboratory "A. Verwey", Coolhaven 32, Rotterdam-3006
The Netherlands.

(4) By whom were you employed in February of 1974?

Chemical Laboratory "Dr. A. Verwey", Coolhaven 32, Rotterdam -3006
The Netherlands.

(5) In what capacity are you now employed?

Management-assistant

(6) In what capacity were you employed in February of 1974?

Senior inspector

(7) In February of 1974 did your duties include conducting surveys of the quantities of oil discharged from the cargo tanks of ocean vessels?

Yes

(8) If the answer to question (7) above is yes, describe the functions you performed in preparing such surveys.

No special preparations. The instruction was received from our principals (Standard procedure), and as a standard instruction given to the surveyor on duty.

(9) In February of 1974 did you personally participate in the testing and measurement of a quantity of light and medium Nigerian crude oil discharged from the M/V TRADE FORTITUDE arriving at Rotterdam on February 7, 1974, and discharged into shore tanks numbered 903 and 960 respectively?

Not in the measurement and testing itself. As mentioned before, these activities were carried out by a surveyor. The final calculations, as well as the checks on the initial calculations, were performed by me. Tests on water content were carried out by qualified chemists in our laboratory.

(10) Did you reach a conclusion as to the gross quantity of light Nigerian crude oil discharged into shore tank No. 903?

Yes, I did

(11) What did you conclude to be the gross quantity of light Nigerian crude oil discharged into shore tank No. 903?

As stated in my report No 0274/A 12518 dated February 12, 1974, page 9:
40 468 478 litres / 15° C (equal to 254 668 US barrels at 60 ° F)

(12) Did you test to determine the net quantity of light Nigerian crude oil by testing the water content of the light Nigerian crude oil?

As stated before, the water content was tested by qualified chemists in our laboratory.

(13) What did you conclude to be the percentage quantity of water contained in the light Nigerian crude oil?

The result of the water content determination was 0.40 (weight) per cent.

(14) Did you make a conclusion as to the net quantity of light Nigerian crude oil discharged into shore tank No. 903?

As stated in my report No 0274/A 12518 dated February 12, 1974, page 9:
40 306 604 litres / 15° C (equal 253 649 US barrels at 60 ° F)

(15) What did you calculate that quantity to be in long tons?

33 311.98 long tons net.

(16) What did you calculate that quantity to be in U.S. barrels at 60° F.?

253,697.46 barrels at 60° F. (In the original report is stated 253 969.46 US barrels, but this is a typing error. The correct quantity is, however, stated on page 10 of this report.

(17) Did you reach a conclusion as to the gross quantity of medium Nigerian crude oil discharged into shore tank No. 960?

Yes, I did

(18) What did you conclude to be the gross quantity of medium Nigerian crude oil discharged into shore tank No. 960?

As stated in my report (page 16) 30 976 268 litres/ 15° C (equal to 194 934 US barrels at 60° F)

(19) Did you test to determine the net quantity of medium Nigerian crude oil by testing the water content of the medium Nigerian crude oil?

As stated before, the water content was tested by qualified chemists in our laboratory.

(20) What did you conclude to be the percentage quantity of water contained in the medium Nigerian crude oil?

The result of the water content determination was 1.50 (weight) per cent

(21) Did you make a conclusion as to the net quantity of medium Nigerian crude oil discharged into shore tank No. 960?

As stated in my report (page 16) : 30 511 624 litres /15° C (equal to US barrels 192 010 at 60° F)

(22) What did you calculate that quantity to be in long tons?

26 946.84 long tons net

(23) What did you calculate that quantity to be in U.S. barrels at 60° F.?

.192 009.65 US barrels at 60° F.

(24) Did you personally prepare or cause to be prepared a survey report in connection with this inspection and testing of the aforementioned quantities of light and medium Nigerian crude oil?

I prepared the report personally.

(25) If so, is the report attached hereto and labelled Plaintiff's Exhibit "1" a complete and accurate copy of your report?

Yes, it is

(26) Was this report prepared in the regular course of business of the Laboratories of Dr. A. Verwey?

Yes

(27) Was it the regular course of business for the Laboratories of Dr. A. Verwey to prepare such reports?

Yes

(28) Was this report prepared at or about the time that the testings and inspections took place?

The report was made out after the actual survey was completed. The report is based upon written and verbal information received from the surveyor in charge.

(29) Did you inspect or cause to be inspected the piping arrangement by which the cargo in question was transported from the M/V TRADE FORTITUDE to shore tanks 903 and 960? Yes, as a part of the standard survey

(30) From such inspections were any defects in the piping arrangements discovered which may have caused cargo leakage?

None, whatsoever

(31) During the time that the discharging operations took place, did you view any leakage of cargo from the piping arrangement?

No leakages were ascertained

(32) Are you familiar with any reports having been made that leakage of cargo occurred in the piping arrangement during the discharge in question?

No, I am not

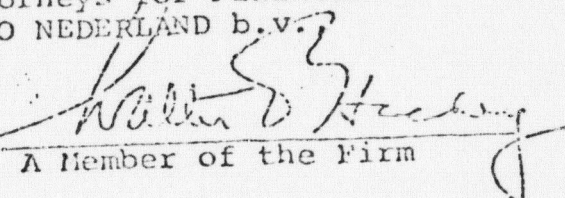
(33) When the discharging operations commenced, state whether the piping arrangement running from the ship's flange to shore tanks 903 and 960 contained cargo, and if so, how much?

As usual, the shore lines are airvented before and after discharge from a supply vessel. After airventing, all the lines are considered to be full of oil. Exact volumes are not known to me.

(34) When the discharging operations were completed, state whether the piping arrangement running from the ship's flange to shore tanks 903 and 960 contained cargo, and if so, how much?
Please see the answer to question 33.

Dated: New York, New York
March 25, 1976

KIRLIP CAMPBELL & KEATING
Attorneys for Plaintiff
ESSO NEDERLAND b.v.

By: 
A Member of the Firm

120 Broadway
New York, New York 10005
(212) 732-5520

TO:

CARDILLO & CORBETT
Attorneys for Defendant
29 Broadway
New York, New York 10006

14 Q What do you understand slops to be?

15 A This is retained residue of oil at the base of
16 tank washings that's on board the ship prior to loading
17 this cargo.

18 Q Was there slop involved with this particular
19 loading at Bonny, Nigeria, in January, 1974?

20 A Yes, but the oil was on board the ship prior
21 to the loading.

22 Q Is that indicated somewhere?

23 A Yes, it was shown on the ullage statement, I
24 believe.

25 Q Did you receive a response from the owners?

2 A Well, when it became apparent that this was a
3 dispute as to whether the slop volumes were in or out of
4 the ullages, we sent a cable to the master of the ship,
5 requesting him to clarify whether the volume was in or
6 out.

7 Q Was this the cable you referred to?

8 A Yes, it is.

9 Q Did you get an answer from the ship?

10 A Yes, he came back with an answer.

11 Q Is this the answer?

12 A Yes, it is. He said that the slops are not
13 included.

11 Q Mr. Scott, referring to the invoice that has
12 been marked as Plaintiff's Exhibit 4 for identification,
13 do you know whether the amounts shown on that invoice have,
14 in fact, been paid by the plaintiff to Exxon International?

15 A Yes, they paid us for that.

16 Q And at what value did they pay for the cargo as
17 loaded on the vessel at Bonny?

18 A This covers just the f.o.b. value for the crude.
19 They paid \$10.321 for the Nigerian medium, for the
20 Nigerian light they paid \$10.658.

1 jk/lf Scott-Cross 50
2 A ~~Yes, Nige. It is Nigerian Light Nig. Med. is~~
3 ~~Nigerian Medium.~~

4 Q Do you recall what Esso Nederland's claim was
5 in February of 1974?

6 A No, I don't.

7 Q If I showed you this document, would this refresh
8 your recollection?

9 A I believe it would. Are you talking about the
10 dollars or the percentages or what?

11 Q I'd like, if you could, tell us the quantity
12 that they were then claiming was short shipped.

13 A All right. They claimed a shortage of 4,308.89 barr
14 which is a 0.958 volume percentage loss, and a C and F
15 cost here, f.o.b., of \$10.321 per barrel cost for the oil,
16 and a freight of \$4.75 a ton or a total loss here of
17 \$24,096.74.

18 Q In arriving at their figures or their claim at
19 that point, did they take into consideration a half of
20 one percent tolerance allowed for losses?

21 A Yes, they did.

22 Q Is that a recognized tolerance in the industry?

23 A It is not recognized by me.

24 Q Do you know whether there is such a custom in
25 the oil trade with respect to a tolerance?

1 A I'm not sure exactly what your question is.

2 Q Is the major part of your job dealing with cargo
3 shortage claims?
4

5 A That's right.

6 Q On both Esso or Exxon owned vessels and Exxon
7 chartered vessels?

8 A Right.

9 Q And if there were a custom in the trade, meaning
10 the oil trade, with respect to allowable tolerance, that
11 is a tolerance that is permitted before a cargo shortage
12 claim is made, would you be familiar with such a custom?

13 A I should be, I would say, yes.

14 Q Are you familiar with any such custom?

15 A Personally, no.

16 Q Would it be a fair statement that plaintiff
17 Esso Nederland was apparently aware of such a custom?

18 A They appeared to be.

19 Q Mr. Scott, I'd like to show you Plaintiff's
20 Exhibit 7, which is a letter dated April 8, 1974, from
21 Exxon International signed by you, addressed to Jones and
22 Gorrissen, who were the brokers who fixed this vessel,
23 and ask you if you find any reference in that letter to a
24 one-half of one percent allowable tolerance for cargo shortage
25 claims.

1 A Yes, there is a tolerance referred to here.

2 Q And did you apply that tolerance to plaintiff's
3 alleged claim in this case?

4 A Yes, we did.

5 Q Mr. Scott, do you have any experience as a deck
6 officer or engine room officer on any type of vessel?

7 A No, sir, I don't.

8 Q Have you ever been at sea?

9 A The Army sent me to sea.

10 Q Other than that?

11 A No.

12 Q Are you familiar with tanker vessels, approximately
13 the size of the Trade Fortitude, in terms of how they
14 operate, their tank sizes?

15 A No, I couldn't say I am.

16 Q Are you familiar at all with how ullages are
17 taken?

18 A I've read about them and I've observed people
19 taking ullages but --

20 Q Are you familiar how the capacity of a tank on
21 a cargo vessel is measured?

22 A I have some knowledge, yes. I'm not an expert
23 by any means.

24 Q Have you ever been on board the Trade Fortitude?

2 A No, I haven't.

3 Q I'd like to show you Plaintiff's Exhibit 13,
4 which is a letter dated September 17, 1974, from Exxon
5 International to Brokerage & Management Corporation, signed
6 by Mr. Huhn, whom I believe you identified as an associate
7 of yours.

8 A An associate, yes, he is.

9 Q Do you know Mr. Huhn's background with respect
10 to whether he has ever served on tankers?

11 A No, he has never served on a tanker.

12 Q Has he ever been on the Trade Fortitude, to the
13 best of your knowledge?

14 A No, I don't believe he ever has.

15 Q Has he ever calibrated the tanks on the Trade
16 Fortitude?

17 A No, he hasn't.

18 Q Have you?

19 A No.

20 Q Mr. Huhn in this letter claims that the tanks
21 of the Trade Fortitude were overcalibrated. Do you know
22 how he arrived at that conclusion?

23 A I believe he has some data that would support that
24 contention.

25 Q Do you know what that data was?

1 jk/lf

Scott-Cross

54

2 A May I see that letter?

3 Q Certainly.

4 A He quotes a number in here, that I believe is
5 probably provided to him from an analysis done by one
6 of our suppliers.

7 Q By one of your suppliers?

8 A Yes.

9 Q Would that be an affiliated company?

10 A No, I believe that number probably originated
11 with Aramco.

2 ~~Q At the discharge?~~

3 ~~A Both at loading and discharge.~~

4 Q Do you know what the purpose of Esso Nederland's
5 taking of ullages at the discharge port on the vessel prior
6 to delivery is?

7 A Yes. The primary purpose is to insure themselves
8 that the oil that was loaded is still on board the ship
9 prior to discharge.

10 Q And do they also, as part of their normal procedure,
11 require a dry tank certificate?

12 A Yes. We would expect to have that as one of
13 the documents submitted with a claim.

14 Q And in your experience, in your present position,
15 does a dry tank certificate indicate that all of the cargo
16 has been discharged?

17 A Mr. Baldwin, that is a very difficult question,
18 but in this particular case there is a dry certificate that
19 indicates that the tanks were properly drained or drained
20 to satisfaction, yes. But it is very difficult to assure
21 yourself that those cargo tanks are empty.

22 Q There is no question in your mind with respect
23 to this particular cargo, that all of the cargo that arrived
24 at Rotterdam was, in fact, discharged?

25 A That is the statement supplied by Esso Nederland, y

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Scott-Cross

61

Q And you have no reason to question it?

A No, that's right.

Q What is the basis of your knowledge that the invoice which has been produced was, in fact, paid in the amount indicated on the invoice?

A Prior to this hearing I contacted our controller's department and asked them to confirm that it was paid, and they did.

Q Do you know how that payment was made?

A I'm not an accountant. It is a very difficult arrangement. But do you want to hear it?

Q Yes, I would like to.

A Apparently each affiliate has what you might call a line of credit. When it gets to -- they have so many bills submitted to them and when those bills reach a certain amount, they are to pay that amount, and in this case, when that bill was submitted, when the line of credit was reached, Esso Nederland paid it.

Q Do you know when that payment took place?

A No, I can't testify to the exact date.

Q Do you know whether there were any adjustments subsequently made in this invoice amount or whether there was any refund or recrediting with respect to this invoice?

A No, I have no knowledge of any refunds or credits.

1 jk/lf

Scott-Cross

62

2 Q Did you make or cause an investigation to be made
3 to find out if there were any such?

4 A Yes. I tried to find out exactly what was paid
5 as it relates to that invoice.

6 Q And your information is that this invoice was
7 paid in full in the amount indicated with no --

8 A Discounts.

9 Q -- refunds or recredit?

10 A This wasn't a period of time when anybody was
11 giving discounts on oil.

2 ~~one about which this witness need not be asked.~~

3 MR. BALDWIN: My question was, your Honor, was
4 he familiar with the procedure or the custom or whatever
5 with respect to when they considered it to be delivered.

6 THE COURT: Well, if you are familiar, you may
7 tell us. Do you have any familiarity with that?

8 THE WITNESS: I don't understand the question.
9 I'm sorry.

10 THE COURT: At what point, if you know, does
11 Esso Nederland take charge of the cargo being delivered to
12 it?

13 THE WITNESS: When do they physically have it?

14 THE COURT: Physically, do you know that, when do
15 their people take charge of it?

16 THE WITNESS: Physically they're not present in
17 Bonny, so they do not take --

18 THE COURT: At the consignee end, when do they
19 take charge from the carrier?

20 THE WITNESS: When the oil crosses the flange at
21 the discharge port, they are there, and you might say it
22 becomes their custodial --

23 MR. BALDWIN: No further questions.

24 REDIRECT EXAMINATION

25 BY MR. NOURSE:

1 jk/lf Scott-Redirect 66
2 Q Mr. Scott, you were asked about indications in
3 some of these earlier letters concerning a .5 percentage
4 tolerance. Have you, yourself, in your capacity as a claims
5 analyst, used a .5 percent tolerance of the sort that is
6 referred to in those letters?

7 A I believe in one of the letters there was
8 reference to that .5, and this was used as a, you might
9 say, negotiating tool to try to resolve this claim quickly
10 and with some show of good faith on our part to resolve the
11 claim.

12 Q To settle the claim?

13 A To settle the claim, yes.

14 Q An allowance for settlement?

15 A Right.

16 Q As a claims analyst, three years in your position,
17 how many claims that you dealt with involving cargo shortage
18 have gone to litigation?

19 A This is the first and only one.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Direct

70

witness for the plaintiff, Mr. James J. Mullin.

J A M E S J. M U L L I N, called as a witness
on behalf of the Plaintiff, having been first duly
sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NOURSE:

Q Mr. Mullin, where do you reside?

A Bayonne, New Jersey.

Q What is your business?

A I am presently employed and own James J. Mullin,
Inc., Petroleum Inspection Company.

Q What is your position in that firm?

A President, chairman of the board.

Q What is the business of that company?

A Expert in quantity and quality petroleum products.

Q What is your background and experience that has
fitted you for that position in that company?

A I have 31 years service in petroleum inspection,
I was president of Charles Martin's Petroleum Inspection,
Inc.

Q What is the firm of Charles Martin, can you tell
us what the business is?

A Again that is a firm that is about a hundred eight
years old who has been engaged in petroleum inspection.

Again quantity and quality experts in the petroleum inspection field.

Q Is that locally or what?

A That would be worldwide.

Q How many years did you spend with Charles Martin?

A 31.

Q What are the range of experiences that you have had with Charles Martin in this field of petroleum inspection?

A I have been a field inspector for a number of years, a tank calibrator for a number of years.

Q What is a tank calibrator?

A A tank calibrator would be to area and establish the volume of a landed shore tank or a vessel.

Q What other positions --

THE COURT: You know, I didn't understand that. I don't know what that means.

MR. NOURSE: Thank you, your Honor.

Q Can you explain that for us, Mr. Mullin?

THE WITNESS: Well, your Honor, tank calibration would be to take this area here, or room, length, width, multiply it by certain areas and qualify how much volume or how much material it can hold. That would be calibration.

THE COURT: You mean calibration is just the same as measurement?

THE WITNESS: Yes, sir.

Q Why is it necessary, Mr. Mullin, to do that with respect to tanks for petroleum products?

A Well, to determine the amount of cargo or product or material that would be either received or disbursed from the tank, so that both parties would be agreeable on amounts.

Q Isn't it possible to weigh the cargo in some fashion rather than measure its specifications by a volume analysis?

A Well, we have the ASTM, the American Society for Testing Materials, and the API, which is the American Petroleum Institute -- they have certain factors that go from volume to weight.

Q In the oil business that is what one does when one measures the weight of cargo or petroleum products?

A Yes.

Q You take a volume and you convert it in some way?

A Yes.

Q To a weight?

A Yes.

Q With respect to your work as a measurer or calibrator, would that have been with respect to the tanks on tank vessels such as the Trade Fortitude?

A Many years ago, yes.

1 Q What does one do as a measurer of volume of a
2
3 vessel's cargo tank?

4 A Well, you proceed to board the tanker or vessel
5 with a tape and bob.

6 Q A bob?

7 A Yes.

8 Q What is that?

9 A A bob is a brass instrument, depending on size,
10 it could be anywhere from six inches to twelve inches, which
11 is attached to a steel tape, which the tape has to be approved
12 by the API or the ASTM.

13 Q These are two organizations you mentioned before,
14 and before you continue your answer, I'd like you to identify
15 them a little better. API, American Petroleum Institute,
16 is what?

17 A Well, they are, I would say, the firms or I should
18 say organizations who meet the standards or create the stan-
19 dards in which the petroleum industry abides by.

20 Q And the ASTM, what is that, what does that stand
21 for?

22 A American Society for Testing Materials.

23 Q What does that society do?

24 A That is the same principle.

25 Q In other words, they set the standards for the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf Mullin-Direct

74

petroleum industry?

A Yes.

Q With respect to your answer concerning what one does in measuring a ship tank to determine its capacity, you indicated you use a bob and a tape. What do you do with those two instruments?

A Well, you take a ullage of each compartment on board the vessel.

Q You take a ullage. What is a ullage?

A A ullage is space between the top of a reference point and the liquid.

Q If I have a glass of water in my hand, which is half full, what is the ullage of that glass?

A You would measure from the liquid level to the top of the glass.

Q From the top of the liquid to the top of the glass. Now is the principle different when one seeks the ullage of a vessel's cargo tank?

A No, same principle.

Q Same principle. Now, having taken a measurement of the ullage, what do you do in determining the capacity of the tank in your function as a measurer of cargo tanks?

A Well, the carrier as a rule has calibration tables.

Q By whom are those tables provided normally?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Direct

75

A ~~By either a petroleum inspection company who~~
~~does the calibration of a ship builder or what they call the~~
~~blueprints.~~

C In other words, the blueprints according to which
the ship was built originally?

A Right.

Q All right. Now you have those things available
to you then, and what do you do in your function as a
measurer of ship's cargo tanks?

A Well, we take the calibration tables as prepared
from the blueprints, and we read off accordingly to the feet
and inches which then state on the calibration table how
many barrels it contains at that ullage.

Q What is the purpose of your making these measure-
ments?

A To ascertain that that ullage or that compartment
contains that much oil according to the calibration tables.

Q You, yourself, have done this on board tank
vessels?

A Yes.

Q In terms of your experience of 31 years with
Charles Martin which is in the business of making measurements
of petroleum products have you reached any conclusion as to
the accuracy of ship measurements of the tank capacities

as opposed to the actual capacity?

A Well, as a general rule, they have -- most carriers are overcalibrated for safety sake.

Q You speak of the word "overcalibrated," what do you mean by that?

A It means that the calibration tables state that there has been more product received ashore than there has been recorded.

Q Let me understand your answer. You say that the tables indicate more product where?

A Would be on board the vessel.

Q More product on board the vessel than what?

A Than what the shore delivery is.

Q You mentioned a reason for that. You said something about safety.

A Well, again I believe that the most, most tankers, most barges are what we would say in the field 98 percent capacity full would be accurate; there is a tolerance --

MR. BALDWIN: I object and ask that that answer be stricken on the grounds that the witness is testifying as to beliefs and there has been no foundation laid with respect, one, to this particular vessel or any other particular vessel. He is not testifying as an expert. He is testifying as to his beliefs.

2 MR. NOURSE: Your Honor, he has testified as to
3 31 years experience in the field of petroleum measurement.
4 He has testified as to his own experience in measuring vessel
5 tanks, and I think that his opinion as to, based on his
6 experience, as to the accuracy of ship measurements should
7 properly come in.

8 THE COURT: Well, I don't -- is this ship sunk?

9 MR. NOURSE: No, your Honor.

10 THE COURT: Here is a ship and the question may
11 be whether its tanks overcalibrated -- I don't want to hear
12 about all the tanks in the world. It seems to me that able
13 counsel like these could have got somebody aboard the ship
14 and shown whether those particular tanks were or were not
15 overcalibrated. So if he is going to testify that lots of
16 ships are overcalibrated I'm not going to give it any
17 weight in these circumstances.

18 MR. NOURSE: Your Honor, I point out that the
19 plaintiff noticed the deposition of the master and the chief
20 mate of this vessel and they have not been produced, so
21 we are left with no witness from the vessel. The defendant
22 produces none here, and I --

23 THE COURT: That won't do because rules 26 to 37
24 or somewhere between have provision for that situation.
25 If you were noticing a deposition and you are not getting

Easo Nederlandl
vs.

M.T. Trade 2
Fortitude

75 Civ. 572 3
George Frankel

10/20/76

jk/lr

Mullin-Direct

79

AFTERNOON SESSION

2:30 p.m.

J A M E S M U L L I N, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. NOURSE:

Q Mr. Mullin, when we broke for lunch we were in the middle of a discussion concerning your experience as a petroleum inspector, and I would like to continue with that, that is, the general nature of the inquiry here.

Mr. Mullin, with respect to your, I believe it is, 31 years at Charles Martin, what was the highest office you held in that company during that period of time?

A President.

Q You were president of the company?

A Yes.

Q For how long were you president of the company?

A From 1971 to 1975, November 18th of '75, and June 10th of 1971.

Q What did you do following your departure from Charles Martin?

A I started my own company.

Q That is the company you presently have?

A Yes.

Q With respect to your, again, qualifications in

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Direct

80

this field, Mr. Mullin, are you a member of any professional societies?

A I'm a member of the American Petroleum Institute, I'm a member of the American Society for Testing Materials, and I'm also a member of the International Standard Organization.

Q What are the functions of those organizations that you have listed?

A This again is to create and renew the standards and update them for the oil industry.

Q Are you on any committees of any of these organizations?

A I am chairman of the working groups for the American Petroleum Institute and also for the ISO, the International Standard Organization.

Q What is the activity of that working group?

A To determine the standards for petroleum measurement.

Q How long have you been a member of that group?

A I have been a member of the API since 1967, and I have been a member of the American Society for Testing Materials since 1967, but I have been chairman of the working group since 1973.

Q The working group, what is the nature of the

activities of that group?

A Again, to determine and update the standards for petroleum measurement.

Q Is that domestic only?

A No, that would be worldwide, because we are in conjunction with the ISO, which is the International Standard Organization, which many countries have now joined.

Q Mr. Mullin, have you at my request reviewed certain of the documents which were marked in evidence this morning?

A Yes.

Q Specifically, the certificate of quantity, there being two such certificates, which were Plaintiff's Exhibit 2 collectively, the tank ship bill of lading, which is Plaintiff's Exhibit 3, the ullage report for the port of Bonny, Nigeria, which was Plaintiff's Exhibit 5A, the discharge ullages shown on the report at Rotterdam, which is Plaintiff's Exhibit 5B, the report of survey, by the Dr. Verwey laboratory, which is Plaintiff's Exhibit 6 -- have you examined those exhibits?

A Yes.

Q I'd like to provide you with the originals of those for use in your testimony.

MR. NOURSE: Your Honor, you have a set, I believe,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Direct

82

of all of those exhibits?

THE COURT: Yes.

Q I'd like you to look, first of all, Mr. Mullin, at Plaintiff's Exhibit 2, that being the certificate of quantity for the light Nigerian crude oil loaded at Bonny. Do you have it before you?

A Yes.

Q Have you examined the calculations that are set out on that certificate?

A Yes.

C I'd like to focus on the numbers here, Mr. Mullin, and I'd like to ask you a series of questions about these calculations. First of all, on the basis of your examination, have you concluded whether the procedures used in making these various measurements were correct and accurate?

MR. BALDWIN: Your Honor, I'm going to object to that question. I don't think the witness has been qualified as an expert or as having any familiarity with the preparation of certificates of quantity, particularly those that are provided at the port of Bonny, Nigeria.

MR. NOURSE: The witness has testified to 31 years as a petroleum inspector making the same sort of calculations that are shown here.

MR. BALDWIN: There's been no testimony, your Honor,

1

jk/lf

Mullin-Direct

83

2

that he has any experience with making the same type of calculations that were made here.

4

MR. NOURSH: Your Honor, I'd be happy to address a series of questions to him.

6

THE COURT: All right.

7

Q Mr. Mullin, referring to the Plaintiff's Exhibit 2, are you familiar with the types of calculations that are shown on that report?

10

A Yes.

11

Q As a petroleum inspector for 31 years, have you had opportunity to make similar calculations?

13

A Yes.

14

Q What basically is being done in these calculations?

15

A You are taking depths of oil or ullages of a landed shore tank, designated as number 15. You are taking before and after measurements. You are calculating it from a temperature, from what we would call a volume reduction you are bringing the gross into net barrels for delivery purposes to a ship, and you are taking water and sediment for deduction from the volume at 60 to determine the quantity of petroleum that was discharged from tank number 15.

23

Q And the end figure, Mr. Mullin, the end quantity, what kind of a figure is that, is it a weight or volume?

25

A This here would be a volume.

2 Q Is there a weight indicated here, also?

3 A Yes, there is.

4 Q Are the type of calculations that are shown here
5 on this certificate involving the measurement of petroleum
6 in a shore tank the sort of measurements that you, yourself,
7 have made?

8 A Yes, sir.

9 Q Are you familiar with the standards in the industry
10 in making such measurements?

11 A Yes, sir.

12 Q Have you reviewed this certificate as to the
13 analysis that it shows in making these measurements?

14 A Yes, sir.

15 Q Do you find any errors in the analysis as shown
16 on the certificate?

17 A No, I find no errors in the way it was done.

18 Q As far as the procedures that are used here as
19 indicated on the certificate, are those the usual procedures
20 customary in the petroleum industry?

21 A Yes.

Q What is the basis for determining what is the amount of water and sediment in oil, how do you do that?

A Again by using the water and sediment by a centrifuge by BS and W.

Q You make an analysis of some sort?

A On a sample.

Q So that the nett figure at the bottom of this form, whether in U.S. barrels at 60°F. or in long tons, then is a figure without water content as determined by a sample of the product?

A Right. We would say at times that would be dry.

Q Dry oil?

A Yes.

Q Without water in it?

A That's correct.

Q The bill of lading in this case is Plaintiff's Exhibit 3. Do you have that there, Mr. Mullin?

A Yes, sir.

Q I'd like you to note the figures for nett barrels

1

jk/lf

Mullin-Direct

92

2

of light Nigerian crude on that bill of lading and compare
3 them to the certificate of quantity that you just examined.

4

A They're the same.

5

Q They're the same. In other words, the bill of
6 lading was made up, it appears, from the certificate of
7 quantity?

8

A Right.

9

Q Is that the normal practice?

10

A Yes.

agent.

Q As was done in this case?

A Yes, sir.

MR. NOURSE: I'd like to point out, your Honor, that there has been a notice to admit in this case concerning the net quantities of both light Nigerian crude oil and medium Nigerian crude oil delivered to the vessel at Bonny. Those are items five and six on the plaintiff's requests to admit pursuant to Rule 36, and the answers from the defendant admit those quantities as delivered to the Trade Fortitude on January 21, 1974, in both cases.

So that there is no issue of fact as to what was delivered to the vessel. The defendant has admitted the bill of lading figures as being accurate.

THE COURT: If that is so, why are we going through all this learning about ullages and certificates and so on?

MR. NOURSE: Because the dispute, your Honor, concerns the figures at the point of discharge, and what we have covered is material to a looking at the figures which we're now about to examine in the Dr. Verwey report which is Plaintiff's Exhibit 6. I'd like to develop that as I go on.

THE COURT: Go ahead.

13 Q If the light crude is in the center tanks, what
14 are the numbers of those tanks, and can you pick out for
15 us, just to go further into it, pick out the ullage of
16 the number one center tank at the loading port for the light
17 Nigerian crude as indicated on the exhibits?

18 A 3'-10".

19 Q That is shown on what exhibit, 5A?

20 A Yes.

21 Q 5A. Now that ullage of 3'-10", what does that
22 represent with respect to that particular tank?

23 A It represents the space between the liquid and
24 the reference point on the vessel, on the tank vessel.

25 Q So it is 3'-10" from the top of the tank?

2 A Right.

3 Q At the same time, I'd like you to focus on that
4 tank, 1 center, at the discharging port. What is the
5 ullage at the discharging port?

6 A 16'-5".

7 Q What does that indicate as to the quantity of
8 cargo in that particular tank, 1 center?

9 A It shows that there is 12'-5" missing.

10 Q 12'-5" of cargo that was there at the loading
11 port, which is not there at the discharging port?

12 A Yes.

13 Q Now I'd like you to look at the other ullages at
14 loading port for those center tanks in which the light crude
15 was located.

16 A Right.

17 Q And compare them, if you will, with the center
18 tank ullages at the discharging port shown on 5B. What
19 generally has happened with respect to those ullages of the
20 center tanks in the course of the voyage from the Bonny loading
21 port to Rotterdam, the discharging port?

22 A I see in four center tanks there's been a decrease.

23 Q That is in number 4 center?

24 A No. 1, 2, 3 and 4 centers.

25 Q All tanks show a decrease in ullage?

1 jk/lf

Mullin-Direct

97

2 A Decrease. Number 5 center shows an increase in
3 ullage.

4 Q What was the Bonny ullage for that fifth tank,
5 No. 5 center?

6 A Loading was 18'-3".

7 Q All right, what happened, what was the situation
8 at discharging port?

9 A 7'-1/2".

10 Q What happened in that tank in terms of gain or
11 loss?

12 A Well, gain we have gained, that would be 10'-9".

13 Q What does that indicate to you as to what happened
14 during the voyage?

15 A It would indicate to me, in my experience, that
16 there was a transfer of cargo from tank No. 1 to tank
17 No. 5.

18 Q I'd like you to focus on the ullage for No. 2
19 center at Bonny. What is the ullage there?

20 A At Bonny was 3'-8".

21 Q What is the ullage at Rotterdam of that same tank

22 A 4'-9".

23 Q The temperature of the oil at Bonny was 94 degree
24 That is indicated at the bottom of the form, is it not?

25 A Yes, sir.

2 Q What is the temperature of that oil in the tank,
3 that is No. 2 center, at Rotterdam?

4 A I would assume that this 59 temperature is right
5 down the center, so I would assume it would be 59.

6 MR. BALDWIN: I'm going to ask that that answer
7 be stricken, your Honor. There is no basis, at least as I
8 can see, on this Plaintiff's Exhibit 5B, for that assumption.

9 MR. NOURSE: I'd like to focus on that, if I may,
10 your Honor.

11 Q Look, please, Mr. Mullin, at Plaintiff's Exhibit
12 5B, at the ullages for the center tank. Do you have that
13 before you?

14 A Yes, sir.

15 Q That is the ship's ullages, 5B. I'd like you --
16 is there a temperature column indicated for the temperature
17 of the oil in the various center tanks?

18 A Yes, sir.

19 Q Is there a figure indicated on the form as to
20 the temperature of tank 1 center?

21 A 59.

22 Q Is there an indication on the report as to
23 the temperature of the other tanks?

24 A There is a line drawn.

25 Q What in your experience does that line, as you

2 indicate it, which is, if I may describe it, a vertical line,
3 with two slash marks across it, indicate as to the temperature
4 of the other tanks?

5 A That it would be 59 all the way down.

6 Q 59 in all of the tanks?

7 A Yes, sir.

8 Q That marking, is that a marking that you have
9 seen in the course of your 31 years as petroleum inspector?

10 A It is a marking I've made myself.

11 Q In your experience it indicates that the
12 same temperature applies in the other tanks?

13 A Yes, sir.

14 Q It is like ditto or the same as, is that correct?

15 A Yes, sir.

2 ullage of that tank from the loading port to the discharging
3 port. It is a change that is not as large as the change at
4 No. 1 center, but it still is a change. Now, we're going
5 here, in this movement of cargo, from Bonny, Nigeria,
6 where the temperature of the oil was indicated as being 94
7 degrees to Rotterdam, where you have indicated the
8 temperature of the oil was 59 degrees. Now what is the
9 effect going to be on the quantity of oil with that change
10 in temperature from 94 to 59?

11 A Well, it should drop a certain amount.

12 Q Have you calculated whether the drop in the
13 ullage and the difference in the gross barrels indicated
14 on the report as being in that tank has changed in amount
15 which would be the same as the change expected as a result
16 of the temperature change, or greater or less than that
17 change?

18 A Well, we're looking at 55,247 versus 54,196
19 at 59. It means that we're bringing 54,196 up to 60, and
20 we'll decrease 55,247 back to 60. I would assume -- and I
21 believe I worked that out -- it is 300 some odd barrels
22 difference.

23 Q My question is: is the change that you see here
24 in the quantity of oil in that tank consistent with the
25 decrease, the change in temperature, or is it more than or

EDITOR'S NOTE

Pages 57 were missing at time of filming. If, and
when obtained, a corrected fiche will be forwarded to you.

2 Q Now, we talked about the center tanks in which
3 the light crude was loaded. I'd like you now to focus on
4 the medium crude. Where was that loaded in the ship?

5 A That represents port and starboard.

6 Q That is in port and starboard tanks?

7 A Yes, sir.

8 Q Looking at the form which is in evidence as
9 Plaintiff's Exhibit 5B, I notice that there is an X drawn
10 for Number 2 port and Number 2 starboard tanks. What does
11 that indicate?

12 A It would indicate that the tank is empty.

13 Q Why would it be empty?

14 A No product. Did not receive product from the
15 shore.

16 Q There is nothing in that tank; you did not consider
17 it. As to the other ullages of 1, 3, 4 and 5 port and
18 starboard tanks, what generally has happened with respect
19 to the ullages between Bonny and Rotterdam?

20 A They have all decreased.

21 Q Are the decreases in ullage of those tanks
22 consistent with only a change in temperature of the product
23 or are they more than should be expected or less than
24 should be expected solely as a result of temperature change?

25 A I'd say they're more than.

2 Q More than?

3 A Yes.

4 Q Do I understand, then, that you are saying that
5 the ullage figures of the vessel at Rotterdam indicate that
6 there is less cargo on board than was at Bonny, certainly
7 less than the change in temperature alone would explain?

8 A Yes, sir.

9 Q Now, I'd like to ask you about a term which appears
10 on both of these ullage reports. On Plaintiff's Exhibit 5A
11 it appears in handwriting, on No. 5 starboard tank -- that
12 would be the right-hand column of figures on the form --
13 and it says "slop tank," and on the Plaintiff's Exhibit 5B
14 there is a notation in the lower left-hand corner under
15 "Remarks," it says "Slops 200 tons."

16 Now in your experience as a petroleum inspector,
17 Mr. Mullin, what does a reference to slop tank and slops
18 200 tons indicate?

19 A On this particular loading you have tank number
20 5 starboard, you have 5'-0" as an ullage, showing as a slop
21 tank, which contains slops.

22 Q What are slops in the petroleum industry; what
23 does that mean?

24 A Slops are residue from previous cargo or tank
25 washings which remain on board.

2 Q As to residue of previous cargo, I can understand
3 that. That is whatever wasn't discharged from the previous
4 discharging port, is that correct?

5 A That's right.

6 Q What do you mean by tank washings, what is that?

7 A Tank washing, the vessel cleans its tanks
8 immediately after loading to take on what they call clean
9 ballast.

10 Q You said immediately after loading the tanks
11 are cleaned.

12 A Immediately after discharge. I'm sorry.

13 Q Thank you.

14 A And he washes his tanks from clingage and tries
15 to segregate that in one tank on board the vessel for the
16 so-called Clean Sea Program.

17 Q First of all, what is the tank on the vessel in
18 which this residue is collected called?

19 A It would be a slop tank, designated by the ship.

20 Q What volume of -- first of all, you mentioned the
21 so-called Clean Sea Program.

22 A The Clean Sea Program is not to discharge your
23 residue or slops into the sea, to try to contain them on
24 board the vessel. There are many major oil companies that
25 have designated the LOT Program, which is Load on Top Program,

2 and then when you get to a designated port which is capable
3 of receiving the product as slop, can receive it,

4 Q What is your own experience with this program,
5 Mr. Mullin?

6 A I've worked very extensively with four or five
7 major oil companies with this.

8 Q And what is the nature of your work in that
9 connection?

10 A It has been outlining procedures to follow; it
11 has been recommending what to do with them.

12 Q With respect to slops which you have described
13 as being cargo residue plus tank washings, what are the
14 relative volumes of residue and the tank washing water?

15 A Well, that is very hard to answer. I would, from
16 my own, I would say 95 percent water and five percent
17 product.

18 Q How do you go about washing a tank? What is the
19 procedure or mechanism, what are the mechanisms used?

20 A You would take sea water through your sea suction.

21 Q That is a valve of some sort in the ship?

22 A Yes, it is port and starboard, in the pump room,
23 and you would take sea water in and what we call sluice
24 or circulate it through each tank on board the vessel, any-
25 where between three to five hundred ton, and bring your

1 jk/lf

Mullin-Direct

106

2 washings down, and bringing it into a segregated tank on
3 board the vessel as designated by the master or the chief
4 mate.

5 There is also another way of doing it, of taking
6 sea water through a Butterworth system, a hose, which is
7 placed into the sea, and it is whirled around -- most or
8 all tankers have what they call Butterworth plates just
9 for this.

10 Q In other words, sea water is introduced into the
11 cargo holds to wash down the residue?

12 A Right, the clingage, et cetera.

13 Q What is left are the slops which is whatever
14 residue there is plus the water that was used in the process?

15 A Yes.

7 Q Now, you have that report before you?

8 A Yes, sir.

9 Q Have you, Mr. Mullin, examined the report with
10 respect to the procedures that were followed and the calcula-
11 tions that were made by the surveyor in taking the various
12 ullage figures, whether they be ship tank or shore tank in
13 determining the weights of oil involved? .

14 THE COURT: Excuse me, Mr. Nourse, do you have
15 still another copy of this for my friend in the
16 jury box?

17 MR. NOURSE: I'm sure we do, your Honor.

18 THE COURT: Thank you.

19 A Would you repeat that question?

20 (Question read)

21 A Yes.

22 Q Can you say, Mr. Mullin, that the procedures
23 used and calculations made were correct and in accordance
24 with the practice in the petroleum industry?

25 A Yes, sir.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Direct

111

written questions to the surveyor that any such conversations did, in fact, take place or that the figures were arrived at from the chief mate. I have no objection to the witness calculating what is on the sheet of papers.

THE COURT: Mr. Nourse agrees with that. We'll disregard that part of the answer.

Q I'd like to focus your attention on the calculation that appear in the middle of that page 4 where the surveyor has listed the various center tanks and has shown the ullages, those ullages, as can be seen from Plaintiff's Exhibit 5, the ullages on the Bonny. How does he determine U.S. barrels, because he sets out U.S. barrel figures there, and there aren't any U.S. barrel figures that appear on the ship's ullage report at Bonny. So what's the source of the barrel figures?

A Well, what I have done in the past, and what I instruct all our inspectors to do, is to go on board the vessel, and which I have done, is to talk with the chief mate, take the loading ullages, take the calibration chart myself, work up the barrels for each individual tank, take a total, to see if it is agreeable, along with the chief mate, and say, "This is what you loaded," and to compare that with my discharge figures.

Q Forgetting for the moment whether it involves the

chief mate, what document is essential for this calibration?

A What document?

Q What table.

A The calibration tables placed on board the vessel.

Q In other words, what does that calibration table tell you?

A It tells me the barrels for every foot and inch for each tank.

Q In other words, if you have an ullage, as we had here, of 3'-10" in No. 1 center tank, you have to look at the ship's calibration table to tell how much barrels that means, is that right?

A Yes, sir.

Q So that the document that you need to make this calculation is the ship's calibration table?

A Yes, sir.

Q And the temperature then, 94 degree temperature, would be determined from the loading ullage report, is that correct?

A Yes.

Q Taking the U.S. barrel figures which are shown for each of these tanks, there is a figure down below where it says calculation of vessel figures, U.S. barrels on board the vessel, 261,857, do you see that?

1

jk/lr

Mullin-Direct

113

2

A Yes, sir.

3

Q How does he arrive at that figure?

4

A He takes the total of the 1 center, 2 center,
5 3 center, 4 center and 5 center, and that is his total.

6

Q Okay, he gets the barrel figures based on the

7

ship's calibration table and he adds them up, is that right?

8

A Yes.

9

Q And he gets that --

10

MR. BALDWIN: I object to that question and the
11 answer, your Honor. There's been no testimony from this
12 witness in the report or in the answers to written questions
13 that the surveyor had the table of calibrations or that he
14 used any such table in calculating his figures or that such
15 report was aboard the vessel.

16

Q Is there any other way he could have gotten those
17 numbers without the ship's calibration tables?

18

A Are you asking me?

19

Q Yes.

20

A No.

21

THE COURT: Let me ask you, Mr. Baldwin, do you
22 know any other way he could have put these down, or will
23 you have any evidence --

24

MR. BALDWIN: To be quite candid with you, your
25 Honor, to answer that question, I just don't know if there

2 are other ways to do that.

3 THE COURT: The witness says it is the only way
4 it could have been done, and here it is in evidence. I
5 will allow it.

6 Q Now with respect to the calculations that are
7 noted here, converting that U.S. barrel figure into long
8 tons, are you familiar with the various tables that are
9 referred to there?

10 A Yes, sir.

11 Q Are those the tables that are properly used in
12 making that calculation?

13 A Yes, ASTM table 11.

14 Q So those are the tables that you would use if
15 you were making that calculation?

16 A Yes, sir.

17 Q Following that, on page 5, is a report of weight
18 determination on board the vessel at the port of Rotterdam.
19 What is being done in this particular calculation that is
20 different from the preceding page?

21 A This one here is that the man is actually taking
22 the ullage himself. He again is taking the chart on board.
23 He was water-thieving to determine free water on the vessel.
24 He's converting that from the calibration tables, and he is
25 includin; U.S. barrels excluding water. He has deducted free

water from the gross barrels and created a net barrel and he has totalled all the tanks up and come up with a total of 256,129.

Q Let me just focus on part of that answer before we go on to the gross number here. You mentioned water-thievi

A Yes.

Q What does that mean?

A Water-thieving is by taking a rod, it could be anywhere from eight inches to 24 inches, and placing paste, which is recognized throughout the industry as either Color-Cut or McCabe's Paste, and by placing that through the petroleum itself, the free water on the bottom of the tank records what we call a red level. It is pink when you put it on, on one grade, and blue when you put it on the other. McCabe's is blue and Color-Cut is pink, and when it turns red -- the water turns the paste red, oil does not bother it at all.

Q Let's think about this cargo tank in which you are making a water-thieving test, I guess you'd call it. Where is the free water going to be located? Is it on top or is it on the bottom?

A Well, water, being heavier, goes to the bottom.

Q So the measurement then is a measurement of free water, I think you called it, at the very bottom of the tank?

1 A Yes, sir.

2 Q To go on to the other parts of your answer, you
3 referred to the calibration table. Again would that be the
4 ship's calibration table as to the volume of the particular
5 tank we're dealing with?
6

7 A Yes.

8 Q And you say there has been an allowance made here
9 for the free water that was found through this water-thieving
10 process?

11 A Yes.

12 Q Is that shown here in the column of the report
13 on page 5 where it is captioned "Water"?

14 A Yes.

15 Q And then the values at the far right-hand side
16 are U.S. barrels excluding water, is that correct?

17 A Yes, sir.

18 Q You mentioned a figure of 256,129 U.S. barrels
19 on board. What do you understand that figure to be?

20 A The total of the five center tanks.

21 Q Totalled these five quantities up above, determined
22 from vessel calibration tables, and they get U.S. barrels
23 on board according to that measurement?

24 A Yes.

25 C They then, I take it, since the end figure here

1 is a long ton figure, determine the weight on the basis of
2 that quantity, is that correct?

3
4 A Yes, sir.

5 -Q What is the end result then of this calculation
6 performed on the basis of the ullage figures of the vessel
7 at the port of Rotterdam, what is the weight of cargo
8 in those tanks as calculated from those ullages?

9 A The amounts would be excluding water, and you
10 would have -- they would be again net, net barrels.

11 MR. BALDWIN: Your Honor, before we accept that
12 testimony, I would ask the witness to note at the bottom
13 of that page, quotation: "All the above mentioned volumes/
14 weights are gross figures." And I ask you if you are still
15 testifying that that bottom figure is a net figure.

16 THE WITNESS: The bottom figure calculations of
17 the vessel figures are excluding water, and I'm quite sure,
18 Mr. Baldwin, if we add one through five center, we're going
19 to come up with 256,129.

20 Q Let me ask you this, Mr. Mullin: has the value
21 for bottom sediment and water, which you spoke about
22 earlier, been removed as far as this calculation shows?

23 A No, sir.

24 Q So that the gross figure, the water that's being
25 discussed here, then, I take it, is the free water which has

1 been noted up above?

2 A Yes, sir.

3 Q So that the value shown here is the weight of the
4 cargo without the free water?

5 A Yes, sir.

6 Q But with whatever component for BS & W or bottom
7 sediment and water may be, is that correct?

8 A Yes.

9 Q I think perhaps that will explain it.

10 A Maybe that was me making a mistake at that stage.

11 THE COURT: Could I ask an ignorant question,
12 gentlemen: Is this kind of survey, such as this report
13 tells about, a standard procedure on the arrival of any
14 petroleum-carrying vessel at any port?

15 MR. NOURSE: You have an answer to that, your
16 Honor, from the witness whose deposition was taken on written
17 interrogatories. He was asked in one of the questions as
18 to whether this was a usual procedure that was carried out
19 for vessels that discharge at Rotterdam. He answered that
20 it was. In other words, Dr. Verwey's office, as I understand
21 it, was retained by Esso Nederland and they made this kind
22 of an inspection on every vessel that discharged at Rotterdam,
23 so in that sense, when the witness indicates that in his
24 answers, this was the usual practice at Rotterdam. As to
25

2 other ports --

3 THE COURT: Do you agree with that, Mr. Baldwin?

4 MR. BALDWIN: That is the testimony, your Honor,
5 yes.

6 THE COURT: All right. Okay. Thank you.

7 MR. NOURSE: I would say, your Honor, that the
8 report is an extremely detailed one and I was amazed to
9 see it because it is so detailed, but the evidence here is
10 that that is what they do in Rotterdam and did at this time.
11 The Dutch are very thorough people, I guess.12 MR. BALDWIN: I apologize for interrupting Mr.
13 Nourse's examination, but I'm not quite clear with respect
14 to the bottom figure on page five, whether we're now in
15 agreement that those long tons are gross tons.

16 THE WITNESS: They are.

17 MR. BALDWIN: They are gross tons?

18 THE WITNESS: Yes.

19 MR. BALDWIN: Thank you.

20 Q In other words, they have excluded the free water
21 but not the base or bottom sediment and water?

22 A Right.

23 Q So we have to be careful of that net and gross?

24 A I apologize. I was in error.

25 THE COURT: Free water means the water that has

2 infiltrated through the oil and not just the bottom layer?

3 Q Would you tell us what free water is?

4 THE WITNESS: Your Honor, free water is actual
5 bottom. This is free water, this is oil on top of water.

6 THE COURT: And the other --

7 THE WITNESS: And the other is BS & W, or sediment
8 in water, which is a mixture, which is stratified throughout
9 the product itself.

10 THE COURT: Okay. Thank you.

11 THE WITNESS: You are welcome.

12 Q I think you indicated earlier that the water
13 content of the particular petroleum is determined from some
14 sort of a test. Can you describe for us a little bit how
15 that figure is determined?

16 A Well, there's two methods. One is ASTM D1786, which
17 is BS & W centrifuge method.

18 Q Centrifugal sample or centrifugal analysis of a
19 sample?

20 A Yes. With that you take a sample of each tank
21 on board a vessel or a shore tank and you combine that with
22 50 cc's of a demulsifier, such as Zylene or Tolulene, along
23 with 50 cc's of product, and you put this into a centrifuge
24 machine, which is swirled a certain, so many revolutions
25 per minute and then read, the sediment water congregates

2 at the tip of the centrifuge tube, and it is read out accord-
3 int to percentage, percentage of samples you have placed
4 in the tube itself.

5 The other method is ASTM D95, which is water
6 by distillation. Now this is actually water --

7 Q May I short circuit this a little bit. In other
8 words, do I understand you either have to centrifuge the
9 water out of the material, out of the sample or you have
10 to boil it out and distill it out, is that correct?

11 A Yes.

12 Q So that that is a very different type of water,
13 in a sense, than in the free water which has accumulated
14 at the bottom of the oil in the tank?

15 A Yes.

16 Q I'd like to compare the figures that have been
17 determined here on pages 4 and 5 of Dr. Verwey's report.
18 Based now, as we have discussed, on the vessel ullages,
19 the figure, the calculation as indicated on page 4; 33,844.78
20 long tons, as compared to the figure shown on page 5,
21 which is the figure determined on the basis of the Rotterdam
22 ullages, which is 33,642.45; now is there a difference
23 between those two figures, at Bonny on one hand and Rotter-
24 dam on the other?

25 A The figures here, it's approximately 200 tons.

2 MR. NOURSE: Your Honor, you might note on page
3 4 of our trial brief we have set out those two figures, and
4 have calculated a difference of 203 long tons between Bonny
5 and Rotterdam solely on the basis of the vessel ullage figures

6 Q Now I'd like to focus your attention on this same
7 sort of analysis, Mr. Mullin, that was done for the medium
8 crude oil and that is at pages 11 and 12 of the Dr. Verwey
9 report. Would you look at those pages, please?

10 A Yes, sir.

11 Q Is the analysis concerning the medium crude the
12 same as the analysis that we just examined concerning the
13 light crude?

14 A The analyses, you mean?

15 Q The procedure that was gone through.

16 A Yes.

17 Q What are the results derived from this analysis
18 of the vessel ullage figures at Bonny and at Rotterdam with
19 respect to the medium crude? First of all, what weight of
20 cargo at Bonny as indicated by the ullages? That is on
21 page 11.

22 A It is showing more.

23 Q Beg pardon?

24 A At Bonny they're showing more cargo.

25 Q Let's just look at the figure first. What is the

amount shown on page 11 for the cargo calculated on the basis of the ullages at Bonny?

A You mean tons?

Q Tons.

A 27,844 versus 27,476, so it's showing approximately 380 tons short on arrival at Rotterdam.

Q In other words, there has been an apparent loss, then, do I understand --

A Yes.

Q -- between Bonny and Rotterdam as indicated by the calculations made on the vessel's ullage figures?

A Yes, sir.

MR. NOURSE: Your Honor, I've set out that calculation at the top of page 5 of our trial brief and that indicates a loss of 367 long tons of the medium, and I have totalled the two values derived only from this analysis, just below that, which indicates the loss of light crude of 203 long tons and of medium crude of 367 long tons. There is a total loss of 570 long tons purely on this basis of calculation, using the vessel ullages.

Q Now I'd like to focus your attention, Mr. Mullin, on the analysis that is made of the shore tank figures as compared with the bill of lading figure that the owner has acknowledged here is a correct figure. That analysis starts, I

believe at page 7 of the report for the light crude, with the chemical sample analysis. Look, I guess, at page 9, if you would, Mr. Mullin, because that is where it starts talking about the shore tank figures.

What is the procedure that's been used here on this analysis to determine the quantity of oil that was delivered from the vessel into the shore tanks at Rotterdam?

A They have gone from weight to volume.

Q Is this the same sort of analysis that we looked at earlier when we examined the figures that appear on the certificate of quantity at the loading port, that being Plaintiff's Exhibit 2?

A It is the same procedure.

Q Yes. Now I notice here that we're speaking in terms of metric units. It indicates, for example, that the liquid level on the tank was 1426 millimeters.

A Right.

Q And it shows then values for liters per 5.5°C.

A Right.

Q That is expectable, I take it, in Rotterdam, a European country?

A Yes, metric system.

Q Is there any difference in the result, whether you use the metric system or the English system that was used in

1 making the measurements at Bonny?

2 A No, because you are following the same procedure
3 all the way through.

4 Q How do you use -- what is the procedure of using
5 metric units as opposed to English units?

6 A One, you are dealing in volume -- we're dealing
7 in volume and they're dealing in weight.

8 Q You have different --

9 A So, I mean, there's differences coming about
10 with the liters, which is again instead of barrels, you are
11 dealing in the volume there. You are dealing in a 5.5°C.
12 rather than Fahrenheit.

13 Q Do they have tables that deal with these metric
14 levels, ullages and quantities and weights?

15 A At certain terminals I have been in, yes.

16 Q On your committee with the American Petroleum
17 Institute, you mentioned you were chairman of a working
18 committee; is that part of the effort that you are involved
19 in in that committee?

20 A Right now, yes.

21 Q So you are familiar with this type of -- the use
22 of a metric system in this problem or area of the calculation
23 of petroleum weights and volumes?

24 A Yes, because eventually our committee is going to
25

126

1 A They have converted from -- they have got a
2 density at a certain temperature for correction, and they
3 have got a temperature at 5.5°C. which is the same as getting
4 our Fahrenheits.
5

6 Q What is the temperature of the oil at the time
7 that the vessel arrived at Rotterdam?

8 A The vessel itself?

9 Q What is the temperature of the oil at the time,
10 in the vessel, at the time it arrived at Rotterdam?

11 A I believe it was 59 and 55, wasn't it?

12 Q That is indicated here on the report, is it not?

13 A Yes.

14 THE COURT: Where?

15 MR. NOURSE: First of all, your Honor, it is
16 indicated in the ullage report which is Plaintiff's Exhibit
17 5B; the temperature is being noted in the vessel, 59 being
18 for the center tanks, that being the light crude, and 55,
19 being the temperature on the wing tanks, which is for the
20 medium crude, so that 55 and 59 in degrees Fahrenheit are
21 the arrival temperatures of the oil.

22 Q What is the oil in the tank, Mr. Mullin, the
23 shore tank at Rotterdam?

24 A It is showing 5.5°C.

25 Q In other words, is that more than or less than

the temperature of the oil in the vessel?

A Well, there is a conversion factor between Fahrenheit and Centigrade you can match up to. Now 15°C . is 59°F . 15.6°C . is 60 degrees. So from the figures here, 5.5°C ., you are showing me that the oil is much cooler than what was arrived at the tank.

Q In other words, in Rotterdam, in February, and getting where the temperature, I take it, is lower than the residual temperature of the oil which made this trip from Bonny, Nigerian, is that right?

A Yes.

Q Is there a calculation made there for the effect on volume of this warmer oil being pumped into a shore tank which has oil at a somewhat cooler temperature, is that dealt with here in these calculations?

A Again, you are following the same principals that you did at the loading, you are taking oil at 5.5°C . and going to bring it up to 60 degrees, right from here you go in to volume, and then you have on the closing which is the same, you are going through the same procedure of again bringing the oil up because of the 13°C ., which is a little bit cooler than 60.

Q I'd like to focus on some figures as determined by the surveyor for the quantity of oil placed in the shore

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Direct

129

tank at Rotterdam. What is the total that he calculates here, total weight, of cargo discharged into the shore tank at Rotterdam from the Trade Fortitude?

A In tons or barrels?

Q In either or both.

A Tons, 33,311.98.

Q Where does that figure appear on page 9 of the report?

A Right below the barrels at 60.

Q In other words, the lower center portion of the page?

A Yes.

MR. NOURSE: Your Honor, I'd like to focus your attention on a correction that was made to the report by the witness at the time of his answering the written interrogatories. There was a notation made by the witness that one of the figures appearing, and the figure appearing on this page 9, that was a typographical error and he changed it, as I think you can see, on the copy which you have before you, to indicate that the U.S. barrel figure was 253,649.46. You will see in the answers that he referred specifically to that correction and it was a typographical correction because the figure appeared correctly at the end of the report where he had summarized the findings. That is why there

1 is a change.

2
3 Q So that 33,331.98 long ton figure, Mr. Mullin,
4 is the calculated weight of cargo in the shore tank after
5 discharge. I'd like you to compare that with the bill of
6 lading figure, which the defendant in this case has admitted
7 was a correct figure for cargo delivered to the vessel, and
8 we're talking now in terms of the light crude oil; what
9 is the comparison between the bill of lading figure for
10 light crude oil and this figure determined by volume and
11 weight, page 9?

12 A Well, the certificate of quantity which was
13 Exhibit 2, showing a delivery, is that the one?

14 Q No, refer to the bill of lading which is Exhibit
15 3, that shows the same figures but they're on the bill of
16 lading, having been acknowledge by the defendant.

17 A The light Nigerian crude, from the bill of lading,
18 we're showing a net figure of 33,179, a gross figure of
19 33,278, and we're showing received ashore 33,311.98, which
20 shows an increase.

21 Q Has there been an allowance at this point for
22 bottom sediment and water?

23 A No, sir.

24 Q Is that subsequently taken into account in the
25 calculations by the surveyor?

2 A Not on this particular one.

3 Q Can you see where that is done on the calculations
4 that follow?

5 A He's got what water on "received" at the top,
6 ASTMD95, four-tenths. Oh, I'm sorry.

7 MR. BALDWIN: Direct me where you are reading
8 from.

9 THE WITNESS: I'm reading from page number 9 now.
10 I didn't see it. I'm sorry again, Mr. Baldwin. I've
11 got so many figures here, it is kind of rough.

12 The 33,311.98 barrels does represent the amount
13 of oil after deduction of water.

14 Q And that indicates then --

15 A I'm sorry on that, I just goofed on that.

16 Q In other words, they have taken into account
17 the water, BS & W content; that is the .4 percent indicated
18 there?

19 A Yes.

20 Q What then is the net result as far as the light
21 crude is concerned as between loading and discharging?

22 A Again I have the net figure of 33,311 after water
23 deduction, and showing me a net figure of 33,179 at loading.
24 I'm showing an increase.

25 Q All right. In other words, they have got more

1 oil, light oil, at the discharging port than they had when
2 they were at the loading port?

3
4 A Right.

5 MR. NOURSE: Your Honor, you might look at page 5
6 of our trial brief, the lower portion of that, we have set
7 out those figures there, and you can see that there is an
8 overage of 133 long tons on the light crude. In other words,
9 for whatever reasons, and we don't know, they had more light
10 crude at the end than they had at the start.

11 THE COURT: It may be a solution to all our
12 problems.

13 MR. NOURSE: I think not, your Honor.

14 THE COURT: I don't mean in this lawsuit; I
15 mean more generally.

16 MR. NOURSE: Your Honor, I'd like to focus now
17 on the situation in the same respect, relating to the medium
18 crude.

19 Q And, Mr. Mullin, in this connection, look at
20 the calculations that were made as to the quantity discharged
21 based on shore tank figures for the medium crude. That is
22 set out at pages, starting at page 16 of the Dr. Verwey
23 report which is Plaintiff's Exhibit 6. Is the analysis
24 on this page concerning the medium crude done in the same way
25 as the analysis for the light crude?

2 A Yes, sir.

3 Q And is it the appropriate and correct analysis
4 as customary in the petroleum industry?

5 A Yes.

6 Q I'd like to focus now on the end quantity of
7 medium crude as determined by these calculations, and what
8 is that value?

9 A The value after water deduction is 26,946.84.

10 Q Comparing that figure you have just given us with
11 the bill of lading figure of the medium crude as loaded at
12 Bonny, has there been a gain or a loss in the oil?

13 A There is a loss.

14 MR. NOURSE: Your Honor, I've set out the figures
15 again on page 5, and that will show a loss on the medium
16 of 743 long tons of the cargo.

17 THE COURT: And in both instances you are talking
18 nett, nett; it is the same kind of product that you measured,
19 right?

20 A Yes.

21 Q In other words that is an apples versus apples
22 figure, is that correct, to use that expression?

23 A Yes.

24 MR. HOURSE: The net result, your Honor, shown
25 at the top of page 6 of the trial memorandum is a loss overall.

1

jk/lf

Mullin-Direct

134

2

considering both cargoes, of 610 long tons, as indicated

3

by these figures that the witness has just given to us.

4

Q I'd like to direct your attention now, Mr.

5

Mullin, to three of the exhibits that were put in evidence

6

this morning through Mr. Scott's testimony. As you may re-

7

call his testimony, since you were here, he indicated that a

8

question had come up as to whether the 200 tons of slops

9

which were on board in the slop tank at Bonny were included

10

in the ullage figures that were shown on the vessel's

11

ullage report at Bonny, and he said that he had had a

12

message sent to the vessel, and that was marked as Plaintiff's

13

Exhibit 9, and in that message it stated, "Re: loading

14

January 21 at Bonny, ship figures light, 33,797 tons;

15

medium 27,687. Please advise if slops 200 tons included or

16

not."

17

Now the answer that came back, which is Plaintiff's

18

Exhibit 10, stated, this is now from the vessel, stated:

19

"Yours 26th (that would be the date of the message) slops

20

not included."

21

Q Now, what does that indicate to you, Mr. Mullin,

22

as a petroleum inspector with 31 years of experience, as to

23

what was done at the loading port with respect to the ullages

24

that were shown on the ullage report, which is Plaintiff's

25

Exhibit 5A?

1
2 A Well, I'd say from experience that the ullage of
3 5'-0 represented so many barrels in the total cargo, it
4 was then relayed into tonnage, and 200 tons was just
5 deducted from the total.

6 Q In other words, they made an adjustment of some
7 sort at the loading port when they made up this ullage
8 report and they have eliminated the 200 tons of slops, is
9 that correct?

10 A I would say, in fact, no adjustment was made in
11 the ullage. I would say that the adjustment was made in the
12 tons, total tons.

13 Q Well, whichever way it was done, an adjustment
14 of some sort was made?

15 A Yes.

16 Q Now I'd like to show you Plaintiff's Exhibit 15
17 which you have before you, which is a certificate of tank
18 inspection at Rotterdam.

19 A 15?

20 Q 15. Do you have that now, Mr. Mullin?

21 A Yes, sir.

22 Q What is that certificate of tank inspection,
23 what does that signify?

24 A It signifies that the inspector went on board,
25 after discharge, and examined the tanks on board the vessel,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Direct

136

and that they were drained to his satisfaction, that they were empty.

Q What had happened then with the 200 tons or to the 200 tons of slop which was on board the vessel at the loading port?

MR. BALDWIN: I object to the form of the question, your Honor.

MR. NOURSE: He has to draw a conclusion from the evidence, your Honor, and I think it is appropriate that he do that.

THE COURT: Is it within the realm of his expertise to draw that conclusion? Do you have an opinion based on what had happened to the slops, Mr. Mullin?

THE WITNESS: I've seen slops, your Honor, go --

THE COURT: No, no, I mean in this case; do you know what happened to them?

THE WITNESS: No, I don't.

THE COURT: All right.

MR. NOURSE: Okay. May I consult with my associate?

(Pause)

MR. NOURSE: There is one more question, your Honor, if I may.

Q Mr. Mullin, referring to Plaintiff's Exhibit 15,

the certificate of tank inspection, is there a reference indicated on that certificate that tank No. 5 starboard, which you have previously identified as the slop tank, was inspected?

A Yes, sir.

Q That is indicated where on the certificate?

A It is indicated on the bottom of the certificate, tanks No. 1, 3, 4, 5, port side and starboard wing tanks, have been inspected, and they have been drained to satisfaction according to the inspector.

Q That is indicated on the certificate?

A Yes.

MR. NOURSE: I have no further questions of the witness, your Honor.

THE COURT: Why don't we take ten minutes.

MR. BALDWIN: Thank you, your Honor.

(Recess)

CROSS EXAMINATION

BY MR. BALDWIN:

Q Mr. Mullin, have you ever been aboard the Trade Fortitude?

A No, sir.

Q You have never examined its tanks?

A No, sir.

1 jk/lr Mullin-Cross 138
2 Q Have you ever examined the calibration table for
3 this particular vessel?

4 A No, sir.

5 Q Do you know what type of ship the Trade Fortitude
6 is, whether it is a motor vessel or motor tanker?

7 A Probably a motor vessel.

8 Q Does a motor tanker or motor ship have boilers
9 on board?

10 A Yes, sir.

11 Q In your experience, Mr. Mullin, have you come
12 across other instances where a vessel on a voyage would
13 transfer cargo from one tank to another tank?

14 A Yes, sir.

15 Q Is there generally a reason for that?

16 A Yes, sir.

17 Q What is that reason?

18 A Well, it has been told to me for safetywise, to
19 bring it to a draft, because of burning bunkers, you are
20 reducing your draft back aft, and you have to bring the
21 level back down for safe waters.

22 Q So it is not unusual or it is normal for a ship
23 to do this when on a voyage in carrying cargo, to keep its
24 trim?

25 A No, sir, it is not unusual.

2 c Do you still have Exhibit 6 in front of you,
3 Mr. Mullin?

4 A Yes, sir.

5 MR. BALDWIN: Mr. Nourse, do you concede or will
6 you stipulate that the evidence indicates that there was an
7 excess amount of light Nigerian crude upon arrival at
8 Rotterdam?

9 MR. NOURSE: We have already indicated that in
10 our brief, your Honor, and in terms of net figures, yes.
11 That is without the so-called BS&W content.

12 THE COURT: What is the B again?

13 MR. NOURSE: Sorry, I think the witness is perhaps
14 best qualified to answer that.

15 THE WITNESS: BS&W is basic sediment and water.

16 Q Mr. Mullin, I'd like to refer you to page 5 of
17 Plaintiff's Exhibit 6 which I think we have agreed refers to
18 gross figures, at least the bottom line, long tons.

19 A Yes, sir.

20 Q And ask you if you would compare those to the
21 bill of lading gross figures for the light Nigerian crude.

22 A That would be Exhibit 3?

23 Q Yes, I'm sorry. Yes, it is.

24 A Gross, I have 33,278 versus 33,642.

25 Q So the surveyor indicates that even using gross

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Mullin-Cross

140

figures there was an excess of light Nigerian upon arrival at Rotterdam, is that correct?

A Yes, sir.

Q Now, I'd like to draw your attention to page 12, Plaintiff's Exhibit 6.

A Yes, sir.

Q Again referring to long tons which I think we'll agree are gross figures --

A Yes, sir.

Q -- and ask you if you would compare those to the bill of lading figures.

A The medium would be 27,276 gross; calculation of vessel's figures, gross, 27,476.

Q So there is a shortage, according to these figures, of approximately 300 tons?

A Two hundred and -- yes, 300 tons, right.

Q I'd like to draw your attention, Mr. Mullin, to page 18 of Plaintiff's Exhibit 6.

A Yes, sir.

Q Which is entitled "Summary of Figures."

A Yes.

Q And I'd like to draw your attention to the lower portion of that page, where the words "ship figures" appear. Do you see that?

2 A Yes, sir.

3 Q And would you tell us what those figures indicate,
4 or let me ask you this -- let me rephrase that. Does the
5 figure 451,815.87 reflect the total cargo on board in
6 gross barrels of both types of cargo?

7 A From this report, yes.

8 Q And the figure of 61,161.14 reflects the total
9 in long tons, again being gross figures?

10 A Yes, sir.

11 Q And right under that reads, my copy, "Surplus
12 in respect of bill of lading figures," is that correct?

13 A Yes, sir.

14 Q Is it your conclusion, from this report, that
15 this surveyor, when comparing the total cargo on board the
16 Trade Fortitude with the bill of lading figures, found a
17 surplus of zero -- I'm sorry, 988.87 U.S. barrels?

18 A Yes.

19 From the bill of lading at the top, showing
20 458.27. Is this the figure you are going by?

21 Q I'm comparing the ship's --

22 A Figures.

23 Q Yes, with the bill of lading.

24 A Well, we have the bill of ladings, right. I see --

25 Q The surveyor, in comparing the total cargo, found

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lr

Mullin-Cross

142

a surplus, is that correct?

A Yes.

Q And when converting it to long tons, the surplus was 157.14 long tons?

A Yes.

Q Gross figures?

A Yes, sir.

Q Now, with respect to Plaintiff's Exhibit 15, which is the certificate of tank inspection, has it been your experience that such a certificate is issued when all of the cargo has been discharged that was on board the vessel?

A It has been my --

Q Or there would be a notation that it had not all been discharged?

A Yes.

Q If there is no such notation it indicates that all of the cargo on board the vessel has been discharged?

A Yes, all material on board the vessel on arrival has been discharged.

Q You use the word "material." I use the word "cargo."

A Okay.

Q I'm asking you, does this reflect that all of the

1 cargo on board the Trade Fortitude at arrival at Rotterdam
2 was, in fact, discharged?

3
4 A Yes.

5 Q In this Plaintiff's Exhibit 6, Mr. Mullin, and
6 when you examined it, did you find any reference to correction
7 for trim?

8 A No.

9 Q There were no such corrections?

10 A No.

11 MR. BALDWIN: I have no further questions.

12 THE COURT: Anything else, Mr. Nourse?

13 MR. NOURSE: Yes, I have one or two, your Honor,
14 if I may.

15 REDIRECT EXAMINATION

16 BY MR. NOURSE:

17 Q Mr. Mullin, Mr. Baldwin started off by asking you
18 to make a comparison between the ship figures, that is,
19 quantities based on the ship ullages, with the bill of
20 lading quantity which, as you have indicated, was based on
21 the shore figures, that is, comparing ship figures on one
22 hand with shore figures on the other hand. Now, what are the
23 factors that will determine whether that is a fair comparison,
24 ship figures versus shore figures? What do you have to con-
25 sider to determine whether or not that is going to give us a

valid answer to the problem we have here?

A You have to have a normal ship-shore delivery. There would have to be records kept of the ship itself and the experience it has with loading and discharging. Again, we would have to revert back, that there was no trim correction. So the trim correction could mean that there would be more on board the vessel or less.

Q Does that comparison depend on the accuracy of the ship calibration tables comparing ship figures now with shore figures?

A The bill of lading figures are on a shore tank, which is stationery.

Q Yes.

A The ship's figures are based on the vessel which is in water, et cetera, which it is possible that you may have a little bit of rolling. It is also possible, which I have seen, that on larger ships that you don't record the half inch or quarter, you just even off at an even inch, to make it easier for the individual at the terminal. So there really is not that much of a comparison with regard to the bill of lading and the shore figures.

MR. BALDWIN: Your Honor, I'm going to ask that that testimony be stricken because it does not refer to the circumstances which relate to this particular vessel. This

1 witness has no evidence as to whether these rounding offs
2 were done and what have you, so I ask that it be stricken.
3

4 MR. NOURSE: Your Honor, Mr. Baldwin brought up
5 this comparison, and I think that the witness, through his
6 31 years as a petroleum inspector, is in a position to comment
7 on whether that is a valid comparison.

8 THE COURT: Well, I'm not at all sure -- if
9 you all want to agree that he can decide the case, I will
10 let him, but otherwise, you'd better leave something to
11 me. I sustain the objection.

12 Q I'd like to focus then, Mr. Mullin, on the
13 comparison between the figures as indicated for gross barrels
14 of the light cargo, both in the ship and on the shore. Now
15 first of all, I'd like to have you look at page 5 of the
16 Dr. Verwey report, which was the report of weight determina-
17 tion made on the basis of the vessel's ullage figures.

18 Speaking now in terms of the light cargo, what
19 is the calculation of weight based on the ship ullage
20 figures at the port of Bonny? The lower right-hand corner
21 of page 5.

22 MR. BALDWIN: Mr. Nourse, I'm sorry, page 5 of
23 mine refers to Rotterdam.

24 MR. NOURSE: All right, then let's refer to page 4.

25 Q Let's look at page 4 which refers to Bonny, what

1 is the quantity on board as indicated on the basis of this
2 calculation?
3

4 A 33,844.78 long tons.

5 Q Now refer to the bill of lading which is Plain-
6 tiff's Exhibit 3. What is the equivalent figure on the bill
7 of lading?

8 A On the light --

9 Q That is Plaintiff's Exhibit 3.

10 A Gross figure would be 33,278.

11 Q In other words, then, there is a difference between
12 the ship figure for the quantity on board at Bonny, according
13 to the ullages, and the bill of lading figure which the
14 owner has accepted here as accurate; the difference then is
15 the difference between 33,844.78 as shown on page number
16 4 of the report, and the gross figure on the bill of lading
17 for the light cargo which is 33,278; that is a difference --

18 THE COURT: Are you asking him a question or are
19 you summing up, because it seems to me you are doing the
20 latter, and I'd rather you didn't use redirect examination
21 for that purpose.

22 MR. NOURSE: Thank you, your Honor.

23 Q Is there a difference, Mr. Mullin, between those
24 figures?

25 A Yes, there is a difference.

1 jk/lf
2 Q In which way does the difference go?

3 A The vessel shows more.

4 Q The vessel shows more than the bill of lading
5 figure?

6 A Than the bill of lading figure.

7 Q I'd like you to look at the same comparison for
8 Rotterdam, taking the ship figure as determined from the
9 ullages, and the bill of lading figure. Look, please,
10 at page 11 for the calculation -- I'm sorry, page 5.
11 This is light now, the light cargo, page 5 --

12 THE COURT: You know, I think this is not a good
13 form of redirect. This is all in evidence. You can argue
14 it. You are using my time unprofitably now.

15 MR. NOURSE: All right. Your Honor, I agree, the
16 figures are here and we can make our arguments based on
17 them.

18 THE COURT: Sure.

19 MR. NOURSE: I have no further questions for the
20 witness.

21 THE COURT: All right, thank you, Mr. Mullin.
22 You are excused.

23 (Witness excused)

24 THE COURT: What else do you have, Mr. Nourse?

25 MR. NOURSE: We rest on behalf of plaintiff, your

1 jk/lf

2 Honor.

3 THE COURT: All right.

4 MR. NOURSE: You had asked a question of Mr. Scott
5 or I believe Mr. Baldwin asked it prior to the luncheon
6 break, as to the price of the cargo which was paid by Exxon
7 International to B.P., the supplier to Exxon International,
8 and we have that data. Would you like to receive it now
9 from the witness who can testify?

10 THE COURT: Mr. Baldwin, can he just stand there
11 and give you the figure?

12 MR. BALDWIN: Yes.

13 MR. NOURSE: Would you like Mr. Scott to give
14 it or shall I?

15 THE COURT: I don't care.

16 MR. NOURSE: The evidence indicates it was a
17 price of \$9.14 per barrel net terms for the light product.
18 We do not have a price for the medium, but the light product
19 was \$9.14 as compared with the ten dollars and some cent
20 price between Exxon International and the plaintiff in this
21 case.

22 Also, we have obtained some information as to the
23 market value of light Nigerian crude in Rotterdam at the
24 time of the vessel's arrival there, indicating that the
25 market value --

1
2 THE COURT: Wait just a second. I'm not sure Mr.
3 Baldwin wants you to give that.

4 MR. BALDWIN: No, that I would require testimony
5 on, your Honor.

6 THE COURT: Is there any reason why you can't
7 get the figure for the medium by tomorrow morning?

8 MR. NOURSE: We'll certainly endeavor to do that,
9 your Honor.

10 THE COURT: Do you want to make some sort of
11 motion, Mr. Baldwin.

12 MR. BALDWIN: Yes, I do, your Honor.

13 I move that the complaint in this action,
14 plaintiff's claim, be dismissed on the grounds that, one,
15 they have failed to establish any liability on the part of
16 the defendant herein, in that they have not established that
17 there has been any cargo shortage or cargo loss.

18 I think that the evidence, your Honor, indicates
19 that the amount of cargo contained in the bill of lading
20 which would be our obligation to deliver was, in fact,
21 delivered to Rotterdam.

22 There was testimony that the ship's responsibility
23 for such cargo ends as soon as it enters the pipe line or
24 the flange at Rotterdam for delivery to the receiver, and
25 since there is in evidence ullages taken on board the vessel

at Rotterdam indicating that there was, in fact, no cargo shortage, I think the plaintiffs have failed to establish their case.

At worse, your Honor, I think it is -- if your Honor does not accept those figures, there has also been testimony by Mr. Scott that the plaintiff Esso Nederland recognizes a custom in the trade which permits a shortage of one-half of one percent, and I think that if your Honor applies that one-half of one percent custom to the plaintiff's claim made herein that claim will disappear, even if your Honor accepts their figures.

Furthermore, your Honor, I move that it be stricken because plaintiffs have failed to establish their damages, one, by their failure at this stage of the game to establish the fair market value of the cargo in question, and as a result of their failure, one, to prove a loss; two, to prove a loss beyond the custom of the trade, that one-half of one percent and because of their failure to establish any damages, I move that the complaint be dismissed.

THE COURT: Well, in denying that motion let me say a couple of things to you, Mr. Baldwin.

First, if you really mean to be relying on a custom in the trade, that tankers are allowed to lose a half a barrel out of every hundred barrels, you are going to need a better

2 record than you have got for this Court to accept such a
3 proposition. I don't think tankers ought to be losing a
4 half a barrel out of every hundred barrels. We're too short
5 of oil to allow that. I don't think this record will sustain
6 it.

7 Whether it is some game they play for settlement
8 purposes is a different question, but you need a very
9 impressive showing to vindicate that position.

10 MR. BALDWIN: I will offer testimony on that,
11 your Honor. I intend to. But I think that contrary to what
12 your Honor just said, with all due respect to that, I think
13 there is an admission on the part of the plaintiff through
14 Mr. Scott that the plaintiff does, in fact, recognize that
15 custom and that was based on, I believe it is Defendant's
16 Exhibit J, which is a letter from the plaintiff to Exxon
17 International. Mr. Scott said --

18 THE COURT: They may well recognize that as a
19 custom for settling cargo claims, which I would like to see
20 you people do with less exceptions, but you are asking me
21 to adopt that as a rule of law, and I tell you that you are
22 going to need more than that to get me to do it. If you
23 lose a mere four, five thousand barrels of oil between Nigeria
24 and Rotterdam, and somebody has to come before me to sue you
25 for the money, as the record stands at this moment, you are

going to have to pay for it.

MR. BALDWIN: Your Honor, I don't believe they have established a loss.

THE COURT: That is another question. I'm only on your custom of the trade proposition.

Now as to the fair market value, since you asked for this, quite properly, Mr. Baldwin, let it be understood that the record remains open for Mr. Scott to produce that figure on the medium oil from B.P. to Esso, and as the record stands, I certainly won't use the figure as between Esso and Esso for fair market value but I might well consider a figure from B.P. to Esso for that purpose. So with that understanding, that the record is still incomplete in that respect, I will deny the motion. Now I don't want to keep you waiting again tomorrow.

(Off the record discussion)

THE COURT: 10:30 tomorrow morning.

(Adjourned to 10/21/76 at 10:30 a.m.)

1 jk/lf

2 was a release. He is here. I don't oppose a request to
3 have him excluded, although I don't really see it is necessary
4 to do it.

5 THE COURT: Let him be excluded. Do you want to
6 show him to the witness room, Eddie.

7 (Prospective witness left the courtroom.)

8 A L E X I S N I C H O L S, called as a witness
9 on behalf of the Defendant, having been first duly
10 sworn, was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BALDWIN:

13 Q Mr. Nichols, by whom are you employed?

14 A Brokerage & Management Corporation.

15 Q What is the business of Brokerage and Management
16 Corporation?

17 A Ship managers.

18 Q Are they and were they the managers of the vessel
19 Trade Fortitude in January, 1974?

20 A Yes, sir.

21 Q What does a manager do with respect to a vessel
22 that it is managing, what are its functions?

23 A A managing company conducts all the affairs
24 that pertain to the running of the vessel, insofar as
25 chartering, operations, claims, bunkering, appointing sub-agent

and whatever other matters come in to the same context.

Q What is your position with Brokerage & Management?

A I'm the vice president of the company.

Q What are your duties as vice president of the company?

A I'm in charge of chartering, I'm in charge of operations. I have all the responsibility of financing and disbursing funds, and I have overseeing responsibilities of making sure that all the other departments are functioning as per the standards the company has set.

Q Would a question of a charter party dispute or a cargo shortage claim come within your jurisdiction?

A Ultimately, yes.

Q That would be your responsibility ultimately.

A If such a matter will not be resolved at the lower levels of the company, yes, ultimately it will come to my attention.

Q How long have you been employed by Brokerage & Management Corporation?

A Four years.

Q By whom were you employed prior to that time?

A Lamorte, Burns & Company, Inc.

Q What is the business of Lamorte, Burns & Company?

A They represent twelve or thirteen, I believe,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Nichols-Direct

158

leading P & I Clubs of the United Kingdom in this country.

Q Would you tell us what P & I Clubs are?

A P & I Clubs are mutual clubs, providing protection and indemnity, as the name signifies, to shipowners for matters concerning cargo claims, disputes arising under charter parties which otherwise is known as FD & D, damages to pier, oil pollution, and other matters again covered under this mutual type of an arrangement.

Q It is a mutual assurance or insurance association formed by shipowners?

A A mutual club is not an insurance company. It is an assurance company whereby the member owners are also part of this syndicate.

Q What function does Lamorte, Burns perform for these associations?

A They act as clearing agents or as claims agents for this country in any type of a claim or dispute that occurs in the United States involving vessels, entered or covered by these various associations. Then Lamorte, Burns designates to individual claims adjusters, as I was one, the file, and our responsibility is to either attempt -- first of all, to evaluate the claim, and then either attempt to settle, and if settlement is not workable, then we refer the matter to counsel for proper defense or further

2 handling, either by way of arbitration or litigation.

3 Q Mr. Nichols, in response to my question about
4 Lamorte, Burns, as I understood your answer, you also des-
5 cribed what your functions were at Lamorte, Burns.

6 A Well, yes, being that I was an adjuster there,
7 a claims adjuster, yes.

8 Q How long were you employed in that capacity?

9 A Three years.

10 Q What types of claims did you handle or become
11 familiar with during those three years?

12 A Cargo claims, including oil tanker cargo claims,
13 and dry cargo claims, as well as FD&D disputes, and as I
14 said earlier, FD&D disputes arising under charter party,
15 demurrage and defense.

16 Q During your employment in Lamorte, Burns, could
17 you give us an approximate number of claims that you handled?

18 A 700.

19 Q By whom were you employed prior to Lamorte, Burns?

20 A Universal Shipping.

21 Q What is the business of Universal Shipping?

22 A Universal Shipping is a ship-owning company, and
23 they owned seven bulk carriers for which we were acting
24 again as owners-agents in the United States.

25 Q What was your title and what were your duties at

Universal Shipping?

A I was in charge of operations. My title was operations manager. And my responsibilities again dealt with claims, insurance, and operational matters.

Q How long were you so employed?

A Seven years.

Q Prior to your employment at Universal Shipping, by whom were you employed?

A Prior to that time, I was in Greece. I had just finished my service in the Navy where I spent three years as a deck officer, and before that I was at the University of Scotland, going to school.

Q What type of degree did you earn?

A I have a Master's Degree in economics.

Q While you were at Lamorte, Burns, could you describe or name some of the companies whose claims you became familiar with? Let me direct you to whether you are familiar with claims made by or involving oil companies.

A Exxon, B.P., Shell, Amaco, Sohio, ELF, CPC, Chinese Petroleum Company, Mobil, Texaco.

Q Are you a member of any professional societies?

A I'm a maritime arbitrator, I'm a director of the Liberian Shipping Council, and I'm a member of the American Association of Arbitration Adjusters.

1 Q Would you tell me what the Society of Maritime
2 Arbitrators is?

3 A It is a body of qualified commercial men who under
4 the act, Maritime Act, Arbitration Act, do conduct themselves
5 as arbitrators and assume appointments to serve as members
6 on arbitration panels and evaluate disputes and award or
7 make awards and decisions on the merits.

8 Q How long have you been a member of that society?

9 A Three years.

10 Q Have you sat as an arbitrator during that period
11 of time?

12 A Yes, sir.

13 Q Does the society concern itself with petroleum
14 cargo shortage claims from time to time?

15 A From time to time, perhaps, yes, although, as we
16 all know, cargo claims under bills of lading are a matter
17 usually litigated rather than arbitrated. Invariably we
18 do come across a situation whereby a charterer will deduct
19 either hire or freight for alleged short delivery or some
20 other type of damaged cargo. Therefore, in that frame,
21 cargo claims do occupy our time.

22 Q Does the society publish or print its awards and
23 decisions?

24 A That is correct.
25

1 Q Are you a subscriber to those awards and decisions?

2 A That is correct.

3 Q Are the other members of the society or some of the
4 other members of the society involved in the petroleum
5 industry?
6

7 A Would you rephrase the question, please?

8 Q Are there members of the society of Maritime
9 Arbitrators who are engaged, as their primary occupation,
10 in the oil or petroleum business?

11 MR. NOURSE: Your Honor, I'm going to object to
12 this line of questioning. I know Mr. Nichols and I know
13 that he is an arbitrator and he has been involved in cases
14 in which I have been a counsel and he has been an arbitrator,
15 but I really see that it has no relevancy to the issues in
16 this case.

17 MR. BALDWIN: Your Honor, what I'm attempting to
18 develop by this line of questioning is Mr. Nichol's
19 familiarity as an expert not only through his background
20 with Lamorte, Burns but currently as a member of the Society
21 of Maritime Arbitrators, that he would be in a position to be
22 familiar with a custom that may or may not exist in New York
23 or in the United States with respect to a tolerance for
24 cargo shortage.

25 MR. NOURSE: I again would object, your Honor,

2 because his testimony is that any such experience would be
3 as a settler of claims or possibly, if it goes that far,
4 as an arbitrator of such claims. The only issue that can
5 concern the Court here is whether the defendant can show
6 that a reason for the non-delivery of oil at Rotterdam was
7 some loss on the voyage, and any factor that may be used in
8 settling claims or in arbitrating claims really doesn't bear
9 on that issue as to whether the carrier can explain the loss
10 occurring on the voyage.

11 THE COURT: Well, let's hear it for what it is worth
12 and then we'll see. You may go on.

13 MR. BALDWIN: Would you read back my last question
14 to the witness, please.

15 (Question read)

16 A I do not know.

17 Q Do you know if there are members of the society
18 who represent owners of tanker vessels?

19 A Oh, yes.

20 Q Do you know if there are members of the society
21 who represent the shippers of petroleum products?

22 A By shippers you mean trading companies? I don't
23 understand your question, sir.

24 Q I will try and rephrase it, Mr. Nichols.

25 Do you know if there are members of the society who

1 represent charterers of oil tankers?

2 A Yes.

3 Q Do you from time to time have discussion with
4 members of the society with respect to cargo shortages that
5 may or may not be involved in particular arbitrations or
6 claims that have been made?
7

8 A We do discuss cases after these cases have been
9 adjudicated and either formally or informally, when the
10 society meets, such discussions take place, and I have to
11 say yes, that I have participated in a number of such dis-
12 cussions.

13 Q In your position or while you were employed with
14 Lamorte, Burns, did you have occasion to discuss cargo
15 shortage claims with representatives of the oil companies
16 that you previously mentioned?

17 A Yes, sir.

18 Q At the same time, that is, while you were employed
19 by Lamorte, Burns, did you have the opportunity to discuss
20 cargo shortage claims with owners of vessels involved in
21 such matters?

22 A Yes, sir.

23 Q Mr. Nichols, over the period of time that you
24 have been involved in the shipping business, have you become
25 aware of a custom with respect to a tolerance permitted in

2 the industry for loss or evaporation of cargo involving
3 petroleum products?

4 A If I may rephrase the question with the permission
5 of the Court, I will give you the answer to this question.
6 The industry has never approved any percentage for a shortage
7 per se. In other words, the industry will not give a
8 carte blanche to an owner whereby he can short-deliver
9 by half of one percent.

10 What the industry is doing is when the vessel has
11 discharged, the owner approved that all the cargo put on
12 board the ship was discharged and there was no cargo left
13 on board the ship, and there was no way that cargo could
14 have been lost during transit, either by consuming it for
15 bunkers, or by virtue of some leakage, then this loss, which
16 is called a loss due to evaporation, or it could be attributed
17 to some other inherent vice of a cargo type of a loss, then
18 industry comes and says, fine, this is a tolerance, but
19 not a tolerance for cargo that has been left inside the
20 vessel as unbunkerable, nor cargo that has remained on board
21 the ship as clingage, or not cargo that has escaped due to
22 some fault at the sea valve, or cargo that has escaped due
23 to some crack, the owner then cannot take advantage of
24 such percentage or allowance. I don't know if I made --

25 Q Let me rephrase this question, or let me ask you

2 this question: have you become familiar with the custom
3 in the industry with respect to those situations where there
4 has been no cargo left on board a vessel, as evidenced by
5 the dry tank certificate, in such a situation is there a
6 custom in the industry with respect to a tolerance?

7 A Yes, sir.

8 Q Would you tell us what that custom is?

9 A The percentage has been assessed to be an average
10 percentage of one-half of one percent.

11 Q Why has this custom been established, Mr.
12 Nichols, if you know?

13 A Because the industry, the oil industry and the
14 chemists have accepted that oil does evaporate, and the
15 lighter the oil, the higher the degree of evaporation. So
16 it is very normal and it is very usual when you transport
17 50 or 60 thousand tons of oil over a period of 20 or 30 days
18 that this oil is going to suffer some degree of evaporation,
19 so if no other cause has created the loss, then the industry
20 feels that perhaps this loss is the result of evaporation.

21 MR. NOURSE: I'm going to object to this. Mr.
22 Nichols doesn't have the background and the shipboard ex-
23 perience to give that kind of an opinion, and I think that
24 we're talking here about what he, as a claims man, or as an
25 arbitrator, may understand is talked about, but I don't think

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jk/lf

Nichols-Direct

167

that is a custom of the industry, and it certainly doesn't indicate that they lose .5 percent of the oil going from X to Y in the course of a voyage. I mean that is nonsense and --

THE COURT: I don't think it is nonsense, but so far you are ahead on the merits. I will take it for what it is worth.

I'm not going to treat Mr. Nichols, because he doesn't treat himself, as a chemist or an expert in the natural sciences that would teach us about the rate of evaporation -- you are not a chemist?

THE WITNESS: No, sir.

THE COURT: But I will hear the evidence.

MR. BALDWIN: Your Honor, he is not being presented for that purpose. He is being presented to establish whether there is a custom within the industry as to this tolerance and I don't think it is necessary that he be a chemist to establish the custom. He may have to be a chemist to establish that a certain percentage evaporates, but whether or not that percentage chemically actually evaporates is not what is at issue here, or not what I'm trying to prove.

THE COURT: Okay. I understand what you are trying to prove. Why don't you just go ahead.

C Mr. Nichols, do you know what type of cargo was

2 being carried on the Trade Fortitude at the time this dispute
3 arose and which is the subject of this dispute?

4 A Yes, sir.

5 Q What type of cargo was that?

6 A Nigerian light and Nigerian medium crude.

7 Q Are you familiar with that type of cargo?

8 A Well, I'm not a chemist, but I know that a light
9 crude is a lower viscosity fuel vis-a-vis -- I'm sorry,
10 the other way around, vis-a-vis a medium crude which is a
11 heavier viscosity fuel. By viscosity, means the density.

12 Q Have you been involved in transporting this type
13 of fuel on other occasions, or your company?

14 A The company is regularly transporting Nigerian
15 crude from Nigeria, of course, to the United States on a
16 monthly basis. We have one ship every month that does a
17 trade.

18 Q Mr. Nichols, when you became employed by Brokerage
19 & Management Corporation, were they operating the Trade
20 Fortitude under charter to Standard Tankers (Bahamas)?

21 A That's correct.

22 Q For how long a period of time, while you were so
23 employed, did they manage that vessel.

24 A Did they who manage the vessel?

25 Q Brokerage & Management, while under charter to

Exxon?

A Throughout the period, until the vessel was --

MR. NOURSE: I object to the question, your Honor. The evidence is that the vessel is on charter to Standard Tankers (Bahamas) Company and that is not Exxon.

MR. BALDWIN: I will rephrase the question, your Honor, to read Standard Tankers (Bahamas), Mr. Nichols.

A The period, I'm repeating the answer, the vessel was -- please, repeat your question, please.

Q For how long a period of time while you were employed by Brokerage & Management did Brokerage & Management manage the Trade Fortitude while under charter to Standard Tankers (Bahamas)?

A Throughout the period.

Q Can you tell us approximately how long that was?

A From -- I joined the company May of '72, and the vessel was delivered back to the owners August 15, 1974. I stand to be corrected on the exact dates, but the month is August, '74, and I joined the company in May, June, of '72.

Q During this period of time, Mr. Nichols, were there any cargo shortage claims made by the charterer or any consignee under any bills of lading?

A No, sir.

Q Mr. Nichols, I'd just like to take you back, if I

may, for a moment, to my series of questions with respect to your association with the Society of Maritime Arbitrators. Does the society distribute or print or publish its awards?

A Yes, sir.

Q I'd like to show you a document and ask you if you can identify this.

A Yes, sir.

Q Will you tell us what it is?

A This is an award concerning a dispute between the owners of the motor ship Virginia Lilly and the charterer, Petrol Rico. The award bears a number 1052. This is the number that the Society of Maritime Arbitrators gives to the different awards as they come, as they have been published, and the date of the award is August 31, 1976. The award is signed by Richard Sommer, Christian Loeffler and Jack Berg, Chairman.

Q And that is one of the awards published by the society, is that correct?

A That is correct.

MR. BALDWIN: I would like to offer that in evidence, your Honor.

MR. NOURSE: I object, your Honor. The award between neither of the parties to the arbitration can't have anything to do with this arbitration. The owner of the

vessel Virginia Lilly is shown as a company in Stockholm, Sweden.

THE COURT: Let me first find out, what are you offering it for?

MR. BALDWIN: To prove, your Honor, the arbitrators in this award found that there is a generally accepted one-half percent tolerance.

THE COURT: Objection sustained.

Q Mr. Nichols, the other day you heard, I'm sure, Mr. Nourse made reference to a dispute and subsequent arbitration between the owners of the Trade Fortitude and the charterer, Standard Tankers (Bahamas), involving going or not going into the Persian Gulf.

A Yes, sir.

Q Are you familiar with that dispute?

A Very much so.

Q Do you recall when that arbitration was decided approximately?

A You mean when the award was published?

Q Yes, or when the decision was rendered, not necessarily when the award was published.

A I would say May of '74.

Q Subsequent to that time, did you have any discussion with anyone representing the charterers with respect to the

2 brief.

3 I think we ought to get over this business.

4 MR. BALDWIN: But, your Honor --

5 THE COURT: Please proceed.

6 Q Mr. Nichols, as a result of this settlement,
7 was there money exchanged or payments made?

8 A Yes, sir.

9 Q And by whom was this payment made, if you recall,
10 or let me withdraw that question.

11 How much was the amount of the payment made?

12 A The net amount, about a hundred thousand dollars.

13 Q And was that paid to owners?

14 A Yes, sir.

15 Q And that was pursuant to the terms of the settle-
16 ment agreement?

17 A That's correct.

18 Q Mr. Nichols, with respect to the call of the Trade
19 Fortitude to Rotterdam in February, 1974, which is the
20 subject matter of this dispute, did owners or Brokerage &
21 Management receive any claims for oil spill and oil pollu-
22 tion at that port at that time?

23 A Oil what?

24 Q Oil spill or oil pollution?

25 A No, sir.

Q Mr. Nichols, are you familiar with the vessel itself, the Trade Fortitude?

A Yes, sir.

Q What type of propulsion does it have?

A 20,000 horsepower MAN engines.

Q What kind of fuel would that use?

A 1500 secs. intermediate fuel.

Q Could it have used the cargo that was on board this vessel for fuel?

A No way. No way a motor vessel can burn crude.

Q Mr. Nichols, while you were employed by Lamorte, Burns and Company, do you recall any claims which ultimately went to litigation, oil or petroleum product claims which went to litigation, which involved a claim of less than one-half of one percent?

A I don't remember.

MR. BALDWIN: I have no further questions.

THE COURT: Let's take ten minutes.

(Recess)

MR. BALDWIN: Your Honor, if I may, I do have a few more questions.

THE COURT: Go ahead.

BY MR. BALDWIN:

Q Mr. Nichols, does Brokerage & Management instruct,

1 give instructions to the masters of vessels, including the
2 master of the Trade Fortitude, during the period of time in
3 question with respect to the taking of ullages on board the
4 Trade Fortitude or did they give instructions?
5

6 A No.

7 Q Was there any instructions with respect to not
8 taking ullages?

9 A With respect to the Trade Fortitude the instructions
10 were for the master not to incur this overtime expense to
11 take ullages being that the vessel was on time charter.

12 Q Why is it significant that the vessel was on
13 time charter?

14 A Because the intake quantity as far as the owners
15 are concerned is not important, because they're getting
16 paid on a monthly basis, therefore the assessment of revenue
17 or income, is not based on the quantitative cargo that the
18 vessel carries at this particular time.

19 MR. BALDWIN: The reason I'm addressing myself to
20 this question is that Plaintiff's Exhibit 5A, which is a copy
21 of an ullage report, taken at Bonny, Nigeria, has apparently
22 had a portion of it removed. We received from the plaintiffs
23 a request for admission, certain documents, one of which was
24 an identical ullage report except the copy they asked us
25 to admit contains the words "The Shell B.P. Petroleum

3 Q Mr. Nichols, the question was did you make that
4 allowance?

5 A I did not --

6 MR. BALDWIN: I think the witness should be
7 permitted to answer the question before another question is
8 posed.

9 THE COURT: Well, it is a rather argumentative
10 answer, but let him finish his answer, Mr. Nourse.

11 THE WITNESS: My answer, your Honor, is that
12 I did not make the allowance. The allowance was agreed
13 upon between the parties. I recommended at times that such
14 allowance be agreed upon and such a recommendation at times
15 was approved by the parties in the dispute. But I was not
16 the one who dictated that such an allowance be made.

17 Q It was an agreement between the parties?

18 A An agreement made, that's correct.

19 Q And it avoided litigation concerning the claim?

20 A Yes.

12 MR. NOURSE: Yes, your Honor, there are two
13 matters that need to be dealt with.

14 You had left open, your Honor, a question as to
15 the price paid by Exxon International as the purchaser of
16 this cargo to B.P., which was the seller, and I have furnished
17 you before with a price for the light crude. Of course, it
18 is the medium crude that is involved here and that price I
19 now have for you.

20 The price paid was \$10.09 per barrel on the medium
21 crude.

22 THE COURT: As compared with what price?

23 MR. NOURSE: I believe the price as shown on the
24 invoice and testified to by Mr. Scott is \$10.3210 per barrel.

25 THE COURT: Well, as to the technical position,

1 jk/lf

205

2 Mr. Baldwin, I take it we may accept this as an evidentiary
3 fact.

4 MR. BALDWIN: Yes, I agree to that, your Honor.

5 THE COURT: My suggestion to you, but it is only
6 a suggestion, is that the \$10.09 figure on this record is
7 much more plausible to me than the figure as between affiliate
8 companies like these, but you rely on whatever you think is
9 proper.